Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WALLACK MANAGEMENT CO., INC.;
625 PARK CORPORATION and IRA LEON RENNERT,

Petitioners,

v.

GOYA FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal courts are vested with the power of contempt in order to vindicate their authority to issue orders binding the parties appearing before them. Because this power is a harsh one, under the guidance of the Supreme Court, the courts have developed a stringent set of requirements that must be satisfied in order to exercise that power. These requirements are rigorously enforced, particularly against nonparties not in privity with the parties in the action. The First Circuit, however, materially altered those stringent requirements when it affirmed the district court's exercise of its contempt power against petitioners, who were nonparties to the action before the district court. It did so despite acknowledging at the inception of its opinion that there was great uncertainty as to whether the district court's order was in effect at the time of petitioners' alleged violation of the order because of respondent's failure to comply with the express statutory conditions necessary to make the provisional relief granted by the district court effective. The First Circuit also altered those requirements when it held that, in the event of any ambiguity, a nonparty had the burden to seek clarification from the district court. As a result, the First Circuit overrode and extinguished the requirement that a court's order be clear and unambiguous, and also extended the reach of a court's jurisdiction to all nonparties having any potential dealings with a party subject to a provisional order by requiring them to seek from that court advisory opinions granting permission to engage in future conduct.

1. Whether the district court has the power to find a nonparty in contempt of an order that was not clearly and unambiguously in effect because, as the First Circuit stated, it viewed the question as "hing[ing] primarily upon a complex issue of first impression. . . ."

2. Whether the district court and the First Circuit abrogated the *Erie* doctrine by finding that an order issued pursuant to the laws of Puerto Rico was in effect despite controlling decisions of the Supreme Court of Puerto Rico holding that orders prohibiting alienation are not enforceable when the party that had requested such relief failed to take the necessary steps to perfect the lien created by the order.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Liliane Unanue; Kalif Trading, Inc. and Ulpiano Unanue Casal, a/k/a Charles Unanue, are being served as respondents.

Neither corporate petitioner has a parent company and no publicly held company owns 10% or more of the stock of either such petitioner.

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Appendix B — Opinion And Order Of The United States District Court For The District Of Puerto Rico Dated May 4, 2001 United States District Court District Of Puerto Rico 32a

Petitioners Ira Leon Rennert, Wallack Management Co., Inc. ("Wallack Management") and 625 Park Corporation ("625 Park") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Appendix ("Pet. App.") at 1a-31a) is reported at 290 F.3d 63 (1st Cir. 2002). The opinion of the United States District Court for the District of Puerto Rico (Pet. App. at 32a-64a) is reported at 141 F. Supp. 2d 207 (D.P.R. 2001).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the First Circuit entered its decision on May 17, 2002. This Court has jurisdiction to review the First Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Article III of the United States Constitution vests federal courts with the inherent power to hold a party in contempt.

Puerto Rico Rule of Civil Procedure 56.4 provides in pertinent part:

> If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of

> prohibition to alienate. The attachment and prohibition to alienate real property shall be effected by recording them with the Registry of Property and notifying the defendant. In case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility.

32 P.R. Laws Ann. App. III, R. 56.4

STATEMENT OF THE CASE

This petition should be granted to resolve an important question concerning the breadth of the federal courts' inherent power to hold a person in contempt. The judicial contempt power is a strong weapon. Prior to this case, that power has always been circumscribed by the requirement that, unless a person (particularly a nonparty) charged with contempt has violated a clear and unambiguous order that the putative contemnor could reasonably determine must be obeyed and how so, that person could not be found in contempt. This requirement is based on the principles of both fairness and due process. Here, the First Circuit overrode this fundamental precept by affirming the district court's contempt ruling against petitioners.

If allowed to stand, the First Circuit's decision raises a substantial question with respect to the scope of the federal judiciary's contempt powers. At the very outset of its opinion, the First Circuit conceded that petitioners could not ascertain whether the order was clearly and unambiguously in effect and whether they were hence forbidden from taking the action for which the district court later found them in contempt.

Nevertheless, the First Circuit affirmed the district court's finding of contempt. As a result of the First Circuit's decision, the contempt authority has been substantially expanded. Nonparties may now be found in contempt by a court whose order is not clearly and unambiguously in effect, and nonparties must seek an advisory opinion from that court in the event of any ambiguity before engaging in any contemplated conduct in order to avoid being held in contempt.

The First Circuit's decision infringes on basic notions of fairness and due process because it places nonparties in jeopardy of a contempt finding in circumstances when the nonparty justifiably believes, after reasonable diligence, that the order at issue did not restrict its behavior or was not in force and effect. Moreover, it expressly creates new and burdensome duties for nonparties. Going forward, even when a nonparty reasonably determines that its contemplated actions would not be subject to a court's order, the nonparty will now be compelled to seek from the court that issues the order an advisory opinion granting permission to engage in the contemplated conduct. Such a requirement effectively extends a court's jurisdiction over a nonparty in a manner not contemplated by Article III or the congressional grant of authority thereunder.

This petition should also be granted to remedy the First Circuit's refusal to abide by and apply the controlling decisions of the Puerto Rico Supreme Court regarding the effectiveness of a prohibition against alienation. *Erie*'s mandate is unyielding, and federal courts cannot arrogate to themselves the right to decide state law questions, especially when there are decisions from the highest court of the jurisdiction. Moreover, assuming *arguendo* that the issue was one of "first impression" as the First Circuit held, a court may not ignore

Erie's mandate. State law should be followed, or the guidance of the state's highest court should be solicited. Here, in derogation of those *Erie* principles, the First Circuit erroneously stated that the issue before it was one of first impression and rendered an unprecedented interpretation of Puerto Rican law. The Supreme Court of Puerto Rico, however, has consistently required that, in order for a prohibition against alienation to create a lien, the party that obtained such relief must perfect its lien through either a seizure of or recording against the property. It has also denied contempt motions, even against parties to an action that acted in violation of such a prohibition. Yet, relying on its interpretation of the breadth of authority given to courts by Rule 56.1 to grant and fashion provisional remedies, the First Circuit dismissed that authority as "*sui generis*" and affirmed the district court's holding that Goya did not have to comply with the conditions precedent expressly set forth in Rule 56.4's requirements.

FACTUAL BACKGROUND

1. The Unanue Judgment

In November 1995 respondent Goya Foods, Inc. ("Goya") commenced an action against defendants Charles and Liliane Unanue and Kalif Trading, Inc. ("Kalif") in the District of Puerto Rico, seeking to enforce a New Jersey judgment against Charles Unanue against the property of Liliane Unanue and Kalif. At that time, Goya brought an ex parte motion seeking provisional remedies in order to secure satisfaction of a possible judgment pursuant to Articles 112 and 113 of the Puerto Rico Mortgage Law, Rule 64 of the Federal Rules of Civil Procedure and Rule 56 of the Puerto Rico Rules of Civil Procedure.

On November 17, 1995, Goya submitted to the district court an Urgent Motion for Ex Parte Provisional Remedies to Secure Satisfaction of Judgment. In its motion, Goya expressly requested the court to issue an order instructing either the Registrar of Property of Puerto Rico or any other appropriate government instrumentality or agency to record cautionary notices against a number of different properties, including Apartment 10A at 625 Park Avenue, New York, New York ("Apartment 10A") and the cooperative shares pertaining thereto (the "Cooperative Shares"), thereby acknowledging its obligation to perfect the grant of such relief. In addition, Goya requested the district court to issue an order prohibiting Liliane Unanue and others from alienating or in any way transferring, selling or otherwise disposing of or encumbering any of the various properties, including the Cooperative Shares. Goya submitted six proposed orders and a writ of attachment.

That same day, the district court signed and entered each of those orders, stating "that provisional remedies [were] necessary to secure enforcement of any judgment which may be rendered against defendants in this case. . . ." Goya's counsel prepared the forms of all the orders, including the two orders that concerned the Cooperative Shares (the "Orders Prohibiting Alienation"), and the district court signed them without modification.

The Orders Prohibiting Alienation granted provisional relief with respect to the Cooperative Shares. The first of the two Orders Prohibiting Alienation prohibited defendants, their agents, employees and all persons holding property for them or acting in concert with them from alienating or in any way assigning, transferring, selling or otherwise disposing or encumbering any real properties, including Apartment 10A,

held in the name of Liliane Unanue. In all material respects, the second Order Prohibiting Alienation is identical, except that it is directed only to Liliane Unanue and addresses only the Cooperative Shares.

In addition, the district court issued two other Orders to Record Cautionary Notice and Prohibiting the Alienation of properties in Spain and Paris. These two orders, which relate specifically to residential property (like the Cooperative Shares) located outside of Puerto Rico, included a decretal paragraph that a cautionary notice be recorded in the appropriate registry. Neither of the Goya-drafted Orders Prohibiting Alienation, however, contained any such language concerning the Cooperative Shares (or language requiring Liliane Unanue to surrender the Cooperative Shares), despite the express requirements of Rule 56.4 of the Puerto Rico Rules of Civil Procedure.

At no time after entry of the Orders Prohibiting Alienation did Goya ever comply with the requirements set forth in Rule 56.4 that apply equally to an order of attachment and a prohibition to alienate. Goya did not seek to have the Cooperative Shares deposited with the court or a designated person. Rather, Goya opted at its own initiative not to act in accordance with Rule 56.4. Goya has never provided any explanation for this failure.

After the district court entered the Orders Prohibiting Alienation, with respect to the Cooperative Shares, counsel for Goya merely sent a letter dated December 1, 1995 to Wallack Management and 625 Park, which enclosed a copy of one of the Orders Prohibiting Alienation.

On October 31, 1997, after a bench trial, the district court entered a Judgment in favor of Goya (the "Unanue Judgment"), allowing the execution of the $6.9 million judgment against the properties described in its decision. The Unanue Judgment stayed "[f]inal execution of judgment" pending appeal, unless Goya posted good and sufficient surety. The Unanue Judgment did not make any reference to the Cooperative Shares, or incorporate the Orders Prohibiting Alienation or otherwise issue any restraint against the Unanues with respect to the Cooperative Shares. Moreover, there was no other order entered, either in connection with the Unanue Judgment or thereafter, that imposed any post-judgment restraints with respect to the Cooperative Shares.

Goya never sought any post-judgment remedies to secure its interest, if any, in the Cooperative Shares. Further, Goya still did nothing to cause Liliane Unanue to deposit the Cooperative Shares with the court, even though it requested the district court to direct her to do so with respect to other shares owned by her.[1]

2. The Sale of the Cooperative Shares

On September 8, 1997, after discussions with Liliane Unanue and before issuance of the Unanue Judgment,

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1. After entry of the Unanue Judgment, Goya moved to amend the Unanue Judgment to restrain Liliane Unanue from transferring her shares in a company known as Emperor Equities. In March 1998, the district court entered the amended judgment that both granted such a restraint and directed Liliane Unanue to deposit those shares with the Clerk of Court "to be held in *custodian legis*." That direction was expressly required under Rule 56.4 in order to perfect the restraint. To this time, Goya has yet to provide an explanation for its failure to do the same with respect to the Cooperative Shares.

Wallack Management wrote Liliane Unanue to confirm its understanding that she was offering the Cooperative Shares for sale. On the following day, however, Liliane Unanue sent Wallack Management a letter stating that the Cooperative Shares and Apartment 10A could not be sold due to an "ex parte provisional attachment" that had been imposed on the property by the district court.

In the Spring of 1998, seven months later, Liliane Unanue contacted Wallack Management, advised Wallack Management that she was now able to sell the Cooperative Shares, and requested Wallack Management to offer them for sale. At that time, there were several people interested in the apartment.

Mr. Rennert thereafter learned from Wallack Management that Apartment 10A might be for sale. Mr. Rennert owned the adjacent apartment and hoped to extend the size of his home. Mr. Rennert offered to purchase the Cooperative Shares for the asking price of $4.6 million. On May 10, 1998, Liliane Unanue advised Wallack Management that she had agreed to sell the Cooperative Shares for the amount offered by Mr. Rennert.

Prior to the closing, Mr. Wallack advised Mr. Rennert that there might be some legal obstacles to proceeding with the sale of the Cooperative Shares. Consequently, Mr. Rennert directed his attorneys to conduct an examination of the record. The attorneys for Mr. Rennert, as did the attorneys for 625 Park, examined the status of Goya's action against Liliane Unanue, and learned that Goya had done nothing to satisfy the conditions set forth in Rule 56.4. In addition, a complete title search was conducted, and no judgment liens, restraining orders or UCC filings against the

Cooperative Shares were found in New York. Based on these analyses, under the case law of the Supreme Court of Puerto Rico, it was apparent that the Orders Prohibiting Alienation were no longer in force and effect and that Mr. Rennert could proceed with acquisition of the Cooperative Shares without violating any existing court order.

Accordingly, in June 1998, as respondents reasonably concluded that there was no prohibition barring a sale, Liliane Unanue and Mr. Rennert and his wife executed a Contract of Sale for the Cooperative Apartment, and 625 Park consented to the sale.[2] The Cooperative Shares were transferred in exchange for $4.6 million wired to Liliane Unanue's account at Credit Suisse Bank in Zurich, Switzerland, in accordance with her instructions.

PROCEEDINGS BELOW

1. The District Court Proceedings

On January 11, 2001, Goya filed its application to hold petitioners in contempt, to which it attached numerous exhibits and deposition testimony. Prior to filing the application, Goya had pursued extensive discovery without petitioners' participation from various nonparties. In its application, Goya (and thereafter the courts) relied on deposition and affidavit testimony that petitioners had no ability to test or cross-examine. *See* Pet. App. at 6a n.2, 40a.

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2. In connection with the sale, 625 Park required Mr. Rennert to provide an indemnification with respect to any expenses and liabilities that 625 Park or Wallack Management might incur as a result of any subsequent litigation with Goya or the Unanues with respect to the Cooperative Shares. Mr. Rennert agreed to do so.

On March 16, 2001, petitioners filed papers in opposition to Goya's motion. Petitioners demonstrated that Goya's motion should be denied because the two Orders Prohibiting Alienation were no longer in force and effect at the time that Mr. Rennert purchased the Cooperative Shares. Further, petitioners demonstrated that Goya did not satisfy its burden of proof by establishing, *inter alia*, that: (i) petitioners had violated any order; or (ii) the Orders Prohibiting Alienation were clearly and unambiguously in effect at the time of the sale.

The district court heard oral argument on April 4, 2001. Thereafter, on May 4, 2001, the district court issued its Order and Opinion, holding petitioners in contempt and awarding Goya "the $4.6 million purchase price of the apartment, plus interest, costs, and attorneys' fees." *Id.* at 64a.

The principal issue before the district court was whether the Orders Prohibiting Alienation were in force and effect after entry of the Unanue Judgment, and the district court concluded that they were in force and effect without analyzing the provisions of Rule 56.4 of the Puerto Rico Rules of Civil Procedure or the pertinent case law. *Id.* at 53a-59a. The district court held that, in spite of the failure to comply with Rule 56.4's express requirements, the Orders Prohibiting Alienation were still in effect on the ground that mere knowledge of their existence was sufficient. *Id.* at 53a. Further, the district court stated that petitioners had the obligation to seek clarification from the court if they had any doubts, citing two decisions that addressed the obligation of a party (as opposed to a nonparty) to seek clarification, and rewriting the quotation from one of those decisions by inserting in brackets a phrase that indicated that the decision addressed the obligations of a nonparty. *Id.* at 60a.

2. The First Circuit's Decision

On petitioners' appeal, the First Circuit affirmed the district court's decision holding petitioners in contempt, but vacated and remanded the decision with respect to the issue of prejudgment interest. Pet. App. at 3a, 31a.

Acknowledging that contempt could not be found unless the order at issue was in effect at the time it was purportedly violated, the First Circuit examined whether the Orders Prohibiting Alienation were still in effect as of June 1998 when Mr. Rennert purchased the Cooperative Shares. *Id.* at 9a-18a. At the outset, the First Circuit observed that the issue of whether the Orders Prohibiting Alienation survived the final entry of judgment was a "thorny issue" of "first impression" and was a "close question." *Id.* at 2a-3a, 8a. Later in the decision, relying on one of its own decisions regarding solely the scope of provisional remedies that can be granted under Puerto Rico law, the First Circuit held that Rule 56.4's recordation and seizure requirements are intended solely to protect the interests of innocent third parties who are unaware that property in a defendant's name is subject to a priority lien, and that "the receipt of actual notice by a particular third party about the existence of that restriction satisfies the rule's notice-giving function as to that party." *Id.* at 12a. In reaching this conclusion, the First Circuit found comfort in two Puerto Rico decisions that did not confront the issue of noncompliance with Rule 56.4 (or any other subpart of Rule 56), and explicitly disregarded the decisions of the Puerto Rico Supreme Court holding that Rule 56.4's recordation and seizure requirements are mandatory in order for a Rule 56.4 attachment or prohibition against alienation to survive as well as to provide the basis for a finding of contempt. *Id.* at 12a-18a.

The First Circuit acknowledged that a party may not be found in contempt "unless the putative contemnor violates a court order that is clear and unambiguous." *Id.* at 22a (citing *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1999)). Even though the First Circuit unequivocally held that it was unclear whether the Orders Prohibiting Alienation were in effect at the time of Mr. Rennert's purchase, the court held that the ' "clear and unambiguous' standard applies only to the *language* of the relevant order, not to its effectiveness." Pet. App. at 22a-23a (citing *Star Financial Services, Inc. v. AASTAR Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996)). The First Circuit did not provide any basis for this distinction. *Id.* Moreover, the First Circuit imposed on a nonparty the unprecedented obligation to seek guidance when there is any ambiguity in advance of engaging in conduct that may or may not violate the order. *Id.* at 20a-21a.

REASONS FOR GRANTING THE WRIT

A. THE FIRST CIRCUIT IMPROPERLY EXPANDED THE FEDERAL COURTS' INHERENT POWER OF CONTEMPT AND EXTENDED THEIR JURISDICTIONAL REACH OVER NONPARTIES

The question presented here is important because it implicates the limits of the discretionary and supervisory powers conferred on the courts by Article III of the Constitution.

This Court has made it clear that federal courts' inherent contempt power "is a potent weapon" that may be abused, thereby making it necessary for this Court to perform its supervisory function as a court of last resort. *See International Longshoreman's Association v. Philadelphia Marine Trade*

Association, 389 U.S. 64, 76 (1967); *see also Young v. United States ex. rel. Vuittonet Fils S.A.*, 481 U.S. 787 (1987); *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); *Pounders v. Watson*, 521 U.S. 982 (1997). Consequently, it is essential that this Court supervise the lower courts' use of their contempt power in order to ensure "that contempt proceedings are conducted in a manner consistent with basic notions of fairness." *Young*, 481 U.S. at 808. In fact, this Court has required extra procedural protections when the contempt finding concerns out of court actions. *International Union, Mine Workers of America*, 512 U.S. at 833.

This Court has traditionally exercised supervisory power over the federal judiciary's inherent contempt power, statutory contempt power, issuance of sanctions, grant of attorney's fees and power under Rule 11. For example, in *Cheff v. Schnakenberg*, the Court explicitly invoked its supervisory power to review a federal court's criminal contempt sanction. 384 U.S. 373, 380 (1966) (the Court acted "in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases"). Similarly, in *Young*, 481 U.S. at 809, this Court held that the "exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the Judiciary." Consequently, this Court has granted certiorari on numerous occasions to review federal courts' exercise of their inherent powers, even absent a split among the Circuits.

Although this Court has not always explicitly stated that it is acting pursuant to its supervisory powers, many of this Court's decisions illustrate the Court's exercise of its authority by granting certiorari to review the use of the courts' inherent powers. For example, in *Shillitani v. United States*, 384 U.S. 364 (1966), this Court granted certiorari to review a charge of contempt against a witness for refusal to answer questions before a grand jury and ultimately reversed the lower court's charge. Further, in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991), this Court granted certiorari to review the scope of the inherent power of a federal court to sanction a litigant for bad faith conduct. Similarly, in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), this Court granted certiorari to review a federal court's use of its inherent power to issue a sanction of dismissal under Rule 37. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (granting certiorari to review whether federal courts have inherent or statutory power to tax attorney's fees directly against counsel who have abused the processes of the courts); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992) (granting certiorari to review whether a federal court may impose sanctions pursuant to Rule 11 in a case in which the district court was later determined to be without subject matter jurisdiction); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (granting certiorari to review the use of sanctions pursuant to Rule 11); *Spallone v. United States*, 493 U.S. 265 (1990) (granting certiorari to review federal courts use of contempt sanctions). Such review is required here.

Here, in affirming the contempt finding against petitioners, the First Circuit overstepped the bounds of the federal judiciary's inherent power. It is well settled that a court's inherent power to issue a contempt finding against a nonparty may be invoked only when the movant has demonstrated by

clear and convincing evidence that: (i) the nonparty had actual notice of the order at the time of the alleged violation; (ii) the order was in effect at the time of the alleged violation; (iii) the order was clear and unambiguous; and (iv) the nonparty aided and abetted a party in violating the order. *See Reliance Insurance Co. v. Mast Construction Co.*, 84 F.3d 372, 376-77 (10th Cir. 1996); *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir. 1987).

The order must be clearly and unambiguously in effect. Otherwise, it would be unfair and inequitable to allow the contempt power to be exercised in circumstances when the putative contemnor could not easily ascertain whether the order applies to its actions. As the First Circuit itself observed:

> Recognizing the contempt power's virility and damage potential, courts have created a number of prudential principles designed to oversee its deployment. For one thing, in levying contempt sanctions, the court must exercise the least possible power suitable to achieve the end proposed. *Spallone v. United States*, 493 U.S. 265, 110 S. Ct. 625, 632, 635, 107 L.Ed.2d 644 (1990); *Shillitani v. United States*, 384 U.S. 364, 371, 86 S. Ct. 1531, 1536, 16 L.Ed.2d 622 (1966). Second, "a complainant must prove civil contempt by clear and convincing evidence." *Langton*, 928 F.2d 1220. For another thing, civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous. *See Local 1291*, 389 U.S. at 76, 88 S. Ct. at 208; *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990); *Drywall Tapers and Painters of Greater N.Y., Local 1974 v.*

Local 530 of Operative Plasterers and Cement Masons Int'l Ass'n, 889 F.2d 389, 395 (2d Cir. 1989), *cert. denied*, 494 U.S. 1030, 110 S. Ct. 1478, 108 L.Ed.2d 615 (1990); *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986); *Inmates of the Allegheny County Jail v. Wecht*, 754 F.2d 120, 129 (3d Cir. 1985); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 749, 752 (6th Cir. 1979). Related to this last requirement is the principle that any ambiguities or uncertainties in such a court order must be read in a light favorable to the person charged with contempt. *NBA Properties*, 895 F.2d at 32.

These principles reflect judicial awareness of the "court's awesome civil and criminal contempt powers." *Wecht*, 754 F.2d at 129.

* * * *

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."

Project B.A.S.I.C., 947 F.2d at 16-17. Further,

> [t]his requirement of clarity derives from concepts of fairness and due process. And, because an order commanding a person to act or refrain from acting is inherently coercive, the requirement of clarity mirrors the requirement of the Civil Rules that "[e]very order granting an injunction . . . shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . . ." Fed. R. Civ. P. 65(d).

Id. at 17. "In short, the contempt power ought not to be deployed against a backdrop of uncertainty." *Id.*; *accord United States v. Voss*, 82 F.3d 1521, 1527 (10th Cir.), *cert. denied*, 519 U.S. 889 (1996); *Grace v. Center for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996); *Harris v. City of Philadelphia*, 47 F.3d 1342, 1352 (3d Cir. 1995); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455 (7th Cir. 1993); *Fonar Corp. v. Deccaid Services, Inc.*, 983 F.2d 427, 429-30 (2d Cir. 1993); *United States v. O'Quinn*, 913 F.2d 221, 227 (5th Cir. 1990); *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990).

Assuming *arguendo* that the First Circuit's holding concerning the effect of the Orders Prohibiting Alienation was proper (petitioners contend that this ruling, however, was constitutionally invalid because it violated the *Erie* doctrine, *see* this Petition at 22-29, *infra*), the First Circuit was confronted with the very type of uncertainty that has previously precluded the courts from exercising their contempt power. Here, the Orders Prohibiting Alienation were not clearly and unambiguously in effect, a point that the First Circuit made abundantly clear by declaring at the very beginning of its decision that this issue was a "close question" and a "complex issue of first impression." *See* Pet. App. at 2a-3a. In other words,

once the First Circuit declared that the question was a close one and one of first impression, the First Circuit was duty bound to enforce the "clear and unambiguous" requirement and to vacate the district court's contempt finding.

By failing to do so, the First Circuit meaningfully eviscerated that critical requirement for finding a nonparty in contempt. The First Circuit's decision thus has two consequences. If allowed to stand, the First Circuit's decision would eliminate one of the necessary self-restraints that this Court has imposed on the federal judiciary's exercise of its contempt power. The First Circuit's decision would also effectively extend the jurisdiction of a court over nonparties, by requiring them to appear before the district court in advance of engaging in any conduct and to seek advisory opinions consenting to the conduct.

First, the restraints on the exercise of the contempt power are fundamental. The power of contempt is a potent and harsh weapon that must be exercised judiciously. *See Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (the contempt power is uniquely "liable to abuse"). The contempt power is to be used sparingly. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion") (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). As a result, this Court has enunciated certain standards that the courts must follow when invoking their inherent contempt powers. For this reason, the courts require that any uncertainties in the order allegedly violated be read in favor of the putative contemnor, especially in cases involving nonparties to the underlying action. *Grace*, 72 F.3d at 1241; *Project B.A.S.I.C*, 947 F.2d at 16; *NBA Properties*, 895 F.2d at 32. Consequently,

any decision that weakens these restraints is inconsistent with the principles enunciated by this Court, and establishes a basis for future courts to employ the contempt finding without reticence.

Whether an order is in force and effect is an integral component of determining whether the order is clear and unambiguous and thus whether a nonparty is advised that certain conduct is prohibited. A nonparty cannot be on clear notice that certain conduct would expose it to the risk of penalty if the conduct of the party who sought relief creates an ambiguity as to whether the order continues in force and effect, exactly as is the case when an ambiguity in the terms of an order creates uncertainty. It is too facile to distinguish between the terms of the order and the effectiveness of the order, as the First Circuit did, especially when the ambiguity regarding the effectiveness of the order was caused by the conduct (or omission) of the party that had sought the relief from the district court.[3]

Second, the First Circuit's decision itself makes explicit the expansion of a court's jurisdiction over nonparties. The court specifically stated that petitioners should have

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3. Had Goya complied with the requirements of Rule 56.4 by requiring the Cooperative Shares to be deposited with a party authorized by the district court, as it did when it moved to amend the Unanue Judgment with respect to the shares of Emperor Equities held by Liliane Unanue, Goya would have eliminated any ambiguity regarding whether the Orders Prohibiting Alienation were in effect. Indeed, it is unseemly to tax a nonparty with the burden of contempt when the undisputed facts established substantial ambiguity about whether the Orders Prohibiting Alienation were in force and effect under Puerto Rico law, especially in light of the decisions issued by the Puerto Rico Supreme Court as of the time that Mr. Rennert purchased the Cooperative Shares.

resolved any ambiguity regarding the effectiveness of the Orders Prohibiting Alienation by seeking clarification from the district court. Pet. App. at 21a-22a.[4] Yet, prior to the First Circuit's decision, no court has held that a nonparty to an action has the obligation to come to the court for guidance when an order or its effectiveness is unclear or ambiguous. All decisions addressing such an obligation have limited such an obligation to only parties. The First Circuit's requirement that a nonparty seek clarification in such circumstances eliminates in its entirety the "clear and unambiguous" requirement for the exercise of the contempt power. In other words, when there is any ambiguity, the First Circuit instead shifts the burden to the nonparty that intends to have dealings with a party that may be subject to an order to appear before the district court to establish its right to act — otherwise, the nonparty will be exposed to the risk of being held in contempt. *See* Pet. App. at 21a-22a. This requirement also eviscerates the rule that any doubt is to be resolved in favor of the putative contemnor. There is no justification for this fundamental expansion of the reach of the courts' contempt power and the imposition of such a burden when, due to the terms of an order or, worse yet, the conduct of the moving party, the order is not "clear and unambiguous," as the First Circuit itself held was the case here. Further, such a requirement would impose a burden on an already overworked federal judiciary, which will have to hear and rule on each such application.

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4. In making this assertion, the First Circuit cites to this Court's decision in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). *See* Pet. App. at 22a. Yet, this decision, as is the case with the other decisions cited by the district court and the First Circuit, addresses only the obligation of a party to seek clarification.

There is no principled basis or justification for such an extension of a district court's jurisdiction under Rule 65 of the Federal Rules of Civil Procedure or the federal judiciary's contempt power.[5] Rule 65 does not give a court such power. Further, the First Circuit's holding is, in fact, inconsistent with the dictates of Rule 65, as it relieves a district court and the party seeking relief or their obligation to make clear and unambiguous both the effectiveness and the terms of a district court's order (a requirement that inherently renders the need to obtain guidance and clarification redundant to say the least).

The consequences of the First Circuit's refusal to enforce the "clear and unambiguous" requirement mandates that certiorari be granted to review the First Circuit's decision.

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5. Rule 65 provides only for a very limited grant of jurisdiction over nonparties to federal court actions. *National Labor Relations Board in Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979). Moreover, in the context of contempt, there is a distinction between the treatment of parties and nonparties. In *Additive Controls & Measurement System, Inc. v. FlowData, Inc.*, 154 F.3d 1345, 1353 (Fed. Cir. 1998), the court explicitly stated that nonparties are differently situated. For instance, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969), this Court held that a nonparty may be found in contempt only if the nonparty had received actual notice of the order and had acted in concert or participation with a party to the injunction. In addition, the Fifth Circuit has held that an injunction does not bind a nonparty unless it stands in a special relationship to a party. *Harris County Texas v. Carmax Auto Superstores, Inc.*, 177 F.3d 306, 314 (5th Cir. 1999); *see also Travelhost, Inc. v. Blandford*, 68 F.3d 958 (5th Cir. 1995); *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500 (8th Cir. 2000).

B. THE FIRST CIRCUIT OVERRULED DECISIONS OF THE PUERTO RICO SUPREME COURT AND CREATED A NEW STATE LAW RULE IN VIOLATION OF THE ERIE DOCTRINE

In *Erie* and its progeny, this Court established the constitutional doctrine that federal courts applying state substantive law may not modify existing state law.

> A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam); *accord Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938) (federal courts may not "exercise an independent judgment as to what the common law of the state is — or should be"); *United States v. Standard Oil Co.*, 332 U.S. 301, 313 (1947) ("in the federal scheme our part . . ., and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities"). In accordance with that doctrine, federal courts are obligated to apply state law even when state law may not be certain. *See Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943). Further, federal courts lack the authority to expand state law because, when taking into account the concerns raised in *Erie* with respect to comity and federalism, the role of the federal courts must be "more modest than that of state courts." *See Standard Oil*, 332 U.S. at 313. As this Court held in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945):

> [i]n essence, the intent of [*Erie*] was to insure that. . . . the outcome of the litigation in the federal court should be substantially the same, so as far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Id. at 109.[6] Here, the First Circuit declined to follow the law of Puerto Rico and instead attempted to find ways to distinguish and limit the controlling decisions of the Supreme Court of Puerto Rico, in order to fashion a new state law rule that excused noncompliance with the express requirements of Puerto Rican law.

As discussed above, in order to be held in contempt, petitioners had to have violated the terms of an order in effect at the time of the alleged violation. *See* this Petition at 14-15, *supra*. The issue before the First Circuit was therefore whether, under Rule 56.4, Goya's failure to perfect its lien caused the Orders Prohibiting Alienation not to be in force and effect. The First Circuit purported to review Puerto Rican law, and held that the failure to perfect was not a bar to the Orders Prohibiting Alienation being in force and effect. Pet. App. at 13a-18a. Without any support, the First Circuit

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6. This Court has made clear that it is impermissible to have "one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before federal courts . . . ." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 180 (1940). Indeed, this Court has found it is intolerable to permit such a dichotomy. *See Baldwin v. Alabama*, 472 U.S. 372, 374 (1985) (resolving a "significant conflict" between the Eleventh Circuit and the Supreme Court of Alabama); *see also West v. AT&T*, 311 U.S. 223, 236 (1940) (the purpose of the Rules Enabling Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in state courts, and the other to be applied in federal courts in cases of diversity of citizenship).

held that it was sufficient that petitioners had mere notice of the Orders Prohibiting Alienation. *Id.* at 18a. The First Circuit made that holding in derogation of its obligation under *Erie* to apply state law as developed by the courts in Puerto Rico.

Rule 56 permits a court to issue provisional orders, including an order prohibiting alienation.[7] Although Rule 56, as reflected in the language of Rule 56.1 and the decisions applying it, grants broad discretion to a court in crafting the appropriate provisional remedy, the other subparts of Rule 56 independently establish strict requirements that are mandatory conditions to any relief granted under Rule 56 becoming effective. Rule 56.4 is one of the subparts that sets forth those requirements and applies to both attachments and prohibitions against alienation. Rule 56.4 states, in pertinent part:

> The attachment and prohibition to alienate real property shall be effected by recording them with the Registry of Property and notifying the defendant. In case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility.

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7. Rule 56.1 provides, in pertinent part, that:

> In every action, before or after entering judgment, and on motion of claimant, the court may issue any provisional order it may deem necessary to secure satisfaction of the judgment. The court may order the attachment, garnishment, the prohibition to alienate, claim and delivery of personal property, receivership, and order to do or to desist from doing a specific act, or it may order any other measure it deems necessary, according to the circumstances of the case.

32 P.R. Laws Ann. App. III, R. 56.1 (Supp. 1991).

32 P.R. Laws Ann. App. III, R. 56.4 (Supp. 1991). Under this provision, Goya was expressly obligated to perfect its rights upon the receipt of a prohibition to alienate. Yet, in contravention of its obligation to adhere to the *Erie* doctrine, the First Circuit disregarded that subpart's plain language as well as the Puerto Rico case law applying that rule.

Prior to the district court's and First Circuit's decisions, all of the case law addressing the effectiveness of both a prohibition against alienation and an attachment required that there be seizure or recordation in order for the remedy to continue in force. *See Stargus Properties v. Superior Court*, 101 D.P.R. Dec. 95, 101, 101 P.R.R. 139, 147 (1973) ("Neither does it appear from the record that [plaintiffs] complied with the requirement of Rule 56.4 to the effect that 'the attachment and the prohibition to alienate shall be effected by recording them in the Registry of Property and notifying the defendant'"); *Cooperativa Central v. Flores*, 68 D.P.R. 726, 729, 68 P.R.R. 672, 676 (1948) (attachment of personal property effected by depositing the property with a person not approved by the court is void); *see also Quadrel Leasing de Puerto Rico, Inc. v. Carlos A. Rivera, Inc. (In re Carlos A. Rivera, Inc.)*, 130 B.R. 377, 381-82 (Bankr. D.P.R. 1991); *Federal Deposit Insurance Corp. v. Debtor & Trustee (In re Moscoso Villaronga)*, 111 B.R. 13, 16-17 (Bankr. D.P.R. 1989). In applying that rule, the Puerto Rico courts have refused to hold a party in contempt for a violation of such an order absent perfection. *See, e.g., Pérez Guerra v. Matos*, 48 D.P.R. 599, 48 P.R.R., 582, 583 (1935) (contempt motion against defendant, who had notice of the restraint, denied because sheriff failed to seize the property that defendant ultimately sold).

No court in Puerto Rico has ever held that a prohibition against alienation is effective post-judgment without perfection. Moreover, no court prior to this case has ever held that mere notice or awareness of a prohibition against alienation absent perfection is effective. Rather, the Puerto Rican courts have held to the contrary. In circumstances when the individual had had notice of the prohibition, the Puerto Rican courts nevertheless specifically refused to enforce the prohibition or to find a party in contempt, even when the alleged contemnor was the party that was bound by the order. *See Stargus*, 101 P.R.R. at 146-47; *Pérez*, 48 P.R.R. at 583-84.

The First Circuit improperly refused to defer to two controlling decisions of the Puerto Rico Supreme Court, and instead reached to distinguish them. Pet. App. at 15a-17a. In those decisions, the Puerto Rico Supreme Court consistently held that, in order to perfect a Order of Prohibition, a party must satisfy Rule 56.4 either through recording (in the case of real property) or through seizure (in the case of personal property). *See Stargus*, 101 P.R.R. at 147 ("Neither does it appear from the record that [plaintiffs] complied with the requirement of Rule 56.4 to the effect that 'the attachment and the prohibition to alienate shall be effected by recording them in the Registry of Property and notifying the defendant'"); *Cooperativa Central*, 68 P.R.R. at 676 (attachment of personal property effected by depositing the property with a person not approved by the court is void). Goya never undertook such actions,[8] and the decisions of the Puerto Rico Supreme Court required the First Circuit to hold that the Orders Prohibiting Alienation were not in effect.

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8. "Goya never properly perfected [the cooperative shares or Apartment 10A] (it neither recorded the prohibition against alienation of the apartment nor ensured that the cooperative shares were physically seized and delivered to the court or some other properly designated custodian). . . ." Pet. App. at 10a.

In *Coopertiva Central,* because the plaintiff did not obtain custody in the precise manner specified by the statute,[9] the Puerto Rico Supreme Court rejected the substantial compliance argument and held that the order was void and ineffective. 68 P.R.R. at 675-76. Similarly, in *Stargus*, because the strict procedural requirements of Rule 56.4 had not been met, the Puerto Rico Supreme Court reversed a contempt finding against the defendant that was expressly bound by the freeze order but had nevertheless sold the property. 101 P.R.R. at 144, 147 ("the requirement of Rule 56.4 to the effect that 'the attachment and the prohibition to alienate shall be effected by recording them in the Registry of Property and notifying the defendant' ").

The First Circuit improperly attempted to distinguish those decisions on their facts, stating that they had no bearing on the issue before it. Pet. App. at 15a-17a. Instead, relying on its personal view that remedies granted under Rule 56 are to be applied liberally, the First Circuit cited two decisions in which the issue of perfection was not before the Puerto Rico Supreme Court.[10] *Id.* at 13a-14a. In addition to the fact

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9. The case arose under Section 10 of the Act to Secure Effectiveness of Judgment. Rule 56.4 is the successor to Section 10, and the two provisions are identical in all pertinent respects. *See Alum Torres v. Campos del Torro*, 89 D.P.R. 305, 89 P.R.R. 299, 315 (1963); Rafael Vizcarrondo, Abner Limardo Sanchez & Jose E. Otero, *Report Submitted to Council on the Justice Reform for Puerto Rico by Civil Procedure Committee*, at 294 (1976).

10. For instance, in *Freeman v. Superior Court*, 92 D.P.R. 1, 92 P.R.R. 1, 21-22 (1965), the Puerto Rico Supreme Court in dicta observed that the provisional order (which was an injunction prohibiting the closing by the defendants on a transaction) became effective as soon as it was served on the parties. The order did not restrain or effect the conduct of a nonparty, and the decision did not address the requirements imposed by Rule 56.4 or any other subpart of Rule 56.

that the decisions do not stand for the proposition advanced by the First Circuit, one of them actually undermines the First Circuit's novel interpretation of Rule 56.4. In *Suarez v. Superior Court*, 85 D.P.R. 544, 85 P.R.R. 522 (1962), the court enforced the order only after expressly finding that there had been compliance with the requirements of both Rules 56.2 and 56.3.[11]

Thus, the First Circuit disregarded the requirement under *Erie* that it play a "modest" role with respect to the construction of Puerto Rican law. It had no constitutional authority either (i) to hold that the two decisions squarely on point were to be limited to their facts with no precedental effect or (ii) to establish the unprecedented rule that a party did not have to comply with the express obligations of Rule 56.4 if it provided informal notice to nonparties of the existence of the prohibition against alienation.

This fundamental conflict between the First Circuit and the Puerto Rico Supreme Court is in derogation of the *Erie* doctrine's requirement that the substantive law of the state is to be applied by federal courts. In addition, the First Circuit's decision runs afoul of the doctrine of *stare decisis*, which required the First Circuit to abide by the Puerto Rico decisions holding that the failure to comply strictly with the requirements of Rule 56.4 renders an order invalid.

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11. The First Circuit's construction of Rule 56.4 is also inconsistent with Puerto Rican law mandating that the letter of the law shall not be disregarded under the pretext of complying with the spirit of the law. *See* 31 P.R. Laws Ann. § 14 (1993); *Municipio de San Juan v. Banco Gubernamental de Fomento*, 140 D.P.R. 873, 883-84 (1996) (no official translation available); *Ferreteria Matos, Inc. v. Puerto Rico Telephone Co.*, 110 D.P.R. 153, 110 P.R.R. 194, 198 (1980).

See Servios Comerciales Andinos, S.A. v. General Electric Del Caribe, Inc., 145 F.3d 463, 478 (1st Cir. 1998). As a result, the district court and the First Circuit each committed constitutional error by not deferring to the Puerto Rican case law requiring strict compliance.

Because of this error as well, certiorari should be granted to review the First Circuit's failure to defer to the controlling law of Puerto Rico.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 17, 2002

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Nos. 01-1928, 01-2497

GOYA FOODS, INC.,

Petitioner, Appellee,

v.

WALLACK MANAGEMENT CO. et al.,

Respondents, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. José Antonio Fusté, *U.S. District Judge*]

Decided May 17, 2002.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and LIPEZ, Circuit Judge.

SELYA, Circuit Judge.

These appeals represent yet another chapter in a seemingly interminable intrafamilial dispute that has run a litigatory gauntlet stretching from Puerto Rico to New Jersey. *See, e.g., Goya Foods, Inc. v. Unanue-Casal*, 275 F.3d 124 (1st Cir. 2001); *Goya Foods, Inc. v. Unanue*, 233 F.3d 38 (1st Cir. 2000), *cert. denied*, 532 U.S. 1022 (2001); *Quiros Lopez v.*

Unanue-Casal (*In re Unanue Casal*), 998 F.2d 28 (1st Cir. 1993); *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839 (1st Cir. 1990); *Goya Foods, Inc. v. Unanue-Casal*, 141 F. Supp. 2d 207 (D.P.R. 2001); *Goya Foods, Inc. v. Unanue-Casal*, 982 F. Supp. 103 (D.P.R. 1997); *Goya Foods, Inc. v. Unanue-Casal* (*In re Unanue-Casal*), 164 B.R. 216 (D.P.R. 1993); *Goya Foods, Inc. v. Unanue-Casal* (*In re Unanue-Casal*), 159 B.R. 90 (D.P.R. 1993); *Quiros-Lopez v. Unanue-Casal* (*In re Unanue-Casal*), 144 B.R. 604 (D.P.R. 1992); *Unanue Casal v. Unanue Casal*, 132 F.R.D. 146 (D.N.J. 1989); *In re Settlement of Accounts of Unanue*, 710 A.2d 1036 (N.J. Super. Ct. App. Div. 1998); *In re Settlement of Accounts of Unanue*, 605 A.2d 279 (N.J. Super. Ct. Law Div. 1991). This chapter arises out of a matched set of interlocutory orders entered by the district court with a view toward barring the transfer of certain assets held in the name of the wife of a judgment debtor (including a lavish Park Avenue cooperative apartment). Despite their knowledge of these court orders, the appellants — Wallack Management Co., 625 Park Corporation, and Ira Leon Rennert — participated in a sale of the apartment. Acting on the petition of the original plaintiff, Goya Foods, Inc., the district court found the appellants in contempt, and awarded substantial monetary sanctions. The appellants ask us to overturn (or, at least, to modify) this award.

The outcome of these appeals hinges primarily upon a complex issue of first impression as to whether Goya's failure to comply strictly with the requirements for perfecting orders prohibiting the alienation of property resulted in the expiration of those orders upon the court's subsequent entry of judgment in the underlying case (and, therefore, left the

appellants free to consummate the challenged transaction). This close question has been well briefed and argued on both sides by able counsel. We conclude that, notwithstanding Goya's failure to satisfy the literal requirements of Rule 56.4 of the Puerto Rico Rules of Civil Procedure, the relevant orders remained legally binding upon the appellants, given their actual knowledge of the prohibition. Largely on that basis, we affirm the district court's contempt findings against the appellants. We find no fault with the court's choice of a monetary sanction, but we conclude that the court misapprehended the relationship of prejudgment interest to that award. Consequently, we vacate the separate award of prejudgment interest and remand for reconsideration of the amount of the monetary sanction.

I. BACKGROUND

In setting the stage, we draw heavily upon our previous distillation of the relevant facts. *See Goya Foods, Inc. v. Unanue*, 233 F.3d at 41-42. We add details only where necessary.

Goya was founded by Charles Unanue's father in 1936. The company prospered. Charles served as a Goya executive from the late 1940s until 1969, when internecine warfare led to his ouster. This, in turn, prompted no-holds-barred litigation involving Goya, Charles, Charles's father, and other relatives. Pursuant to settlements reached in 1972 and 1974, Charles received more than $4,400,000; in exchange, he surrendered his ownership interest in Goya and agreed that he would neither contest his father's will nor file any claims against his father's estate. The settlement agreements

further provided that if any signatory wrongfully sued another signatory, the transgressor would be liable for liquidated damages equal to twice the victor's litigation expenses.

Charles's father died in 1976. Eleven years later, Charles claimed that he was entitled to an inheritance from his parents' estates (including certain Goya shares that his father had placed in trust). The trustees resisted the claim and sought a judgment in a New Jersey state court barring Charles from maintaining any action against either the trust or his parents' estates. After protracted litigation, the New Jersey court enforced the 1974 settlement agreement, enjoined Charles from pressing further claims of entitlement, and entered judgment for Goya, pursuant to the liquidated damages clause, for approximately $6,900,000. *In re Unanue,* No. M-128817 (N.J. Super. Ct. Ch. Div. 1995) (unpublished opinion).

In the midst of this odyssey, Charles repaired to Puerto Rico and filed a petition for personal bankruptcy. From that point forward, the battle continued in both New Jersey and Puerto Rico. Among other initiatives, Goya filed an adversary proceeding in the bankruptcy court in which it contended that Charles was concealing assets by placing them in the names of various straws (including his wife, Liliane Unanue).

Eventually, the bankruptcy court dismissed Charles's insolvency petition without granting him a discharge. *In re Unanue-Casal,* No. 90-04490, slip op. at 5 (Bankr. D.P.R. 1995). With the shield of bankruptcy shattered and a state court judgment in hand, Goya mounted a new offensive. It sued Charles and Liliane Unanue in Puerto Rico's federal district court, asserting that Charles was the beneficial owner

of various assets held in Liliane's name, and, therefore, that it was entitled to reach and apply those assets to satisfy the New Jersey judgment. To ensure against dissipation of the assets, Goya moved for the imposition of provisional remedies.

The district court granted the motion on November 17, 1995, and issued an ex parte order prohibiting the alienation of various properties held in Liliane's name. Pertinently, the order encompassed a cooperative apartment located at 625 Park Avenue in New York City (the Apartment). In a companion order, the court barred any transfer or other alienation of the cooperative shares memorializing Liliane's interest in the Apartment.[1] Goya then transmitted copies of the district court's orders to both 625 Park (the cooperative housing association that owned the building) and Wallack Management (the building's managing agent).

Almost two years later, the district court resolved the underlying litigation, holding, inter alia, that Charles was the beneficial owner of the cooperative shares and the Apartment, and entering judgment to that effect. *Goya Foods, Inc. v. Unanue-Casal*, 982 F. Supp. at 109-12. Although the ruling ordinarily would have cleared the way for Goya to levy against the Apartment, the court stayed execution

1. A cooperative apartment is one that is owned by a corporation (the cooperative). The ownership interest in the apartment is held and conveyed in the form of shares in the corporation (known as cooperative shares). A shareholder's right to occupy the particular apartment that he or she "owns" derives from a proprietary lease entered into between the corporation (*qua* landlord) and the shareholder (*qua* tenant).

pending appellate review. *Id.* at 112. In February 1998, Goya informed both Wallack Management and 625 Park of the district court's decision and requested that it be notified before any disposition was made of the Unanues' interest in the Apartment.

That same month, Wallack Management informed Liliane that she was in default of her obligation to make mandatory maintenance payments to the cooperative, and that 625 Park would terminate her interest and take possession of the Apartment unless she cured the default. Adverting to this threat, Liliane asked the district court for permission to sell the Apartment, and her attorney informed Wallack Management that she had filed such a motion. The court did not rule upon the request, but, rather, ordered counsel to meet and discuss possible solutions to the dilemma.

In May 1998, Liliane agreed to sell the Apartment to Rennert for $4,600,000. Prior to the closing, Rennert's attorneys discovered that Goya had neglected either to record a cautionary notice of *lis pendens* in the Manhattan land records or to file a Uniform Commercial Code (UCC) statement anent the cooperative shares. Concluding that the November 1995 orders had lapsed when the district court entered judgment in November of 1997, Rennert's counsel advised him that no effective judicial restraint precluded Liliane from conveying clear title to the Apartment.[2]

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2. This conclusion was not self-evident. The attorney originally retained by Liliane bowed out of the transaction based on his belief that the proposed sale would, if consummated, violate the November 1995 orders.

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The bylaws of the cooperative required 625 Park's approval of any transfer of shares. After consultation with counsel, 625 Park's board ratified the proposed sale of Liliane's shares (and, effectively, of the Apartment), on condition that Rennert indemnify it for all loss, cost, or damage (including litigation expenses) resulting from any challenge to the sale. Rennert agreed to hold both Wallack Management and 625 Park harmless, and the transaction proceeded.

The closing took place in June of 1998. From the $4,600,000 purchase price, Wallack Management, acting as Liliane's broker, received a $276,000 commission. Liliane's net proceeds (well in excess of $4,000,000) were wired to a Swiss bank account. The final version of the sales agreement included a confidentiality clause.

Goya did not learn of the transaction until October of 2000. It immediately brought the matter to the district court's attention. The court directed Charles and Liliane to appear personally and show cause why they should not be adjudged in contempt for violating the November 1995 orders. When neither defendant appeared at the appointed time — the record suggests that both Charles and Liliane sought sanctuary abroad — the court held them in contempt, issued warrants for their arrest, and dissolved the preexisting stay (thus allowing execution of the outstanding judgment). Twenty-three days later, we affirmed the district court's original judgment. We upheld, inter alia, the finding that several properties held in Liliane's name (including the Apartment and the cooperative shares) were in actuality owned by Charles. *Goya Foods, Inc. v. Unanue*, 233 F.3d at 44-46, 48.

Goya next petitioned the district court to hold Wallack Management, 625 Park, and Rennert in civil contempt for defying the November 1995 orders. The court directed the appellants to show cause why they should not be so cited. The appellants made a proffer but, following Goya's counter-proffer and a non-evidentiary hearing, the district court determined that all three appellants had violated the November 1995 orders by participating in the purchase of the Apartment and the cooperative shares despite their actual knowledge of those orders. *Goya Foods, Inc. v. Unanue-Casal*, 141 F. Supp. 2d at 219, 224. Accordingly, the court adjudged the appellants in civil contempt, and held them jointly and severally liable to Goya for the $4,600,000 purchase price.[3] *Id.* at 224. Although the appellants filed a notice of appeal, Rennert, acting pursuant to a court order, deposited the sum of $4,600,000 in the registry of the district court (presumably in lieu of a supersedeas bond). After some further skirmishing (not relevant here), the court embellished the original award with prejudgment interest. *Goya Foods, Inc. v. Unanue-Casal*, Civ. No. 95-2411 (D.P.R. Oct. 5, 2001) (unpublished opinion). A second appeal followed. We consolidated the two appeals for briefing and oral argument.

Our analysis is divided into three parts. We start by grappling with the thorny issue of whether the unperfected November 1995 orders survived the entry of judgment in

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3. The district court also stated that it would grant attorneys' fees to Goya, *see Goya Foods, Inc. v. Unanue-Casal*, 141 F. Supp. 2d at 224, but the record on appeal contains no indication that a fee award has eventuated. In all events, these appeals do not raise any issues anent attorneys' fees.

November 1997. Next, we address the other aspects of the district court's finding of contempt. Finally, we review the assessment of a monetary sanction and the award of prejudgment interest.

II. THE NOVEMBER 1995 ORDERS

The crux of these appeals is whether the November 1995 orders precluding the transfer of the Apartment and the cooperative shares were legally effective against the appellants when Rennert acquired the assets in June of 1998. Our starting point is the acknowledged power of a federal district court to issue orders "providing for seizure . . . of property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action." Fed. R. Civ. P. 64. By its terms, that rule allows a federal court to borrow provisional remedies created by state law. For this purpose, Puerto Rico is deemed the functional equivalent of a state. *E.g., HMG Prop. Investors, Inc. v. Parque Indus. Rio Canas, Inc.*, 847 F.2d 908, 912-13 (1st Cir. 1988).

Following this paradigm, the court below made use of Rule 56 of the Puerto Rico Rules of Civil Procedure, 32 P.R. Laws Ann. app. III, R. 56. In pertinent part, that rule empowers a court, on an ex parte application, to issue provisional remedies that it deems "necessary to secure satisfaction of [an anticipated] judgment." *Id.* R. 56.1. Such remedies include "an order of attachment or of prohibition to alienate." *Id.* R. 56.4. The rule then provides, however, that:

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> The attachment and prohibition to alienate real property shall be effected by recording them with the Registry of Property and notifying the defendant. In case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility.

Id.

The appellants appear to concede, at least tacitly, that the district court intended the November 1995 orders to secure Goya's potential recovery against Charles Unanue, and that those orders constituted legally binding restraints while Goya's case against Charles and his ostensible straws (including Liliane) was pending in the district court. The appellants maintain, however, that when the court entered final judgment in that case in November of 1997 — in their view, the stay of execution and the ensuing appeal make no difference — the provisional remedies envisioned by those orders lapsed because Goya had not perfected them as required by Rule 56.4.

This argument derives from the language of Rule 56.4. Focusing on the drafters' use of the word "shall," the appellants posit that the rule's recordation and seizure requirements are obligatory. Since the remedies granted by the district court vis-à-vis the Apartment and the cooperative shares were provisional and Goya never properly perfected them (it neither recorded the prohibition against alienation of the Apartment nor ensured that the cooperative shares were physically seized and delivered to the court or some other properly designated custodian), the appellants argue that

those remedies expired upon the entry of judgment and, thus, were no longer in effect some seven months later (when Rennert acquired the assets).

Distilled to bare essence, we must determine the effect of Goya's failure to comply with the recordation and seizure requirements of Rule 56.4 prior to the district court's entry of judgment. In the first instance, this is an abstract legal question. Consequently, we afford de novo review. *McCarthy v. Azure,* 22 F.3d 351, 354 (1st Cir. 1994); *Liberty Mut. Ins. Co. v. Comm'l Union Ins. Co.,* 978 F.2d 750, 757 (1st Cir. 1992).

The district court held that strict compliance with the recordation and seizure requirements of Rule 56.4 was not necessary in every situation. *Goya Foods, Inc. v. Unanue-Casal,* 141 F. Supp. 2d at 219. At first blush, that holding squares with the core principle that undergirded our decision in *HMG Property Investors.* There, we noted that the Supreme Court of Puerto Rico has construed Rule 56 expansively:

> Rule 56 of the Rules of Civil Procedure confers upon the court sufficient flexibility to issue the measures which it deems necessary or convenient, according to the circumstances of the case, to secure the effectiveness of the judgments. Its only limitation is that the measure be reasonable and adequate to the essential purpose of the same, which is to guarantee the effectiveness of the judgment which in due time may be rendered. This flexibility, so necessary for the administration of justice,

> is the greatest virtue of Rule 56, virtue which we should promote and preserve instead of mystifying it with technical concepts and requirements.

847 F.2d at 913-14 (quoting *F.D. Rich Co. v. Super. Ct.*, 99 P.R.R. 155, 173 (1970)). As this passage evinces, and as we concluded in *HMG Property Investors,* flexibility is the hallmark of Rule 56.

This emphasis on flexibility is important in considering how Rule 56.4's recordation and seizure requirements are intended to operate. At bottom, those requirements serve to protect the interests of innocent third parties (e.g., potential acquirers) who come upon the scene unaware that property standing in a defendant's name is subject to a priority lien. The recordation and seizure requirements enable such a third party, in the exercise of due diligence, to learn about attachments, restrictions on alienation, and other impediments to the passage of marketable title. *See, e.g.*, 30 P.R. Laws. Ann. § 2051 (explaining that one of the purposes of the Puerto Rico Registry of Property is to facilitate the recordation of "judicial opinions which may affect the legal capacity of the owners of record").

We think it follows that if the raison d'etre of the recordation and seizure requirements is to furnish notice that specific property is subject to a court-imposed restriction, the receipt of actual notice by a particular third party about the existence of that restriction satisfies the rule's notice-giving function as to that party. Indeed, insisting upon strict compliance with the recordation and seizure requirements as to a third party possessing such knowledge would plunge the courts into the very vortex that the Supreme Court of

Puerto Rico has endeavored to avoid. *See F.D. Rich Co.*, 99 P.R.R. at 173 (warning against "mystifying" Rule 56 "with technical concepts and requirements").

In this spirit, the Puerto Rico courts have demonstrated their readiness to look to the facts and circumstances of each case, as opposed to requiring unblinking, lockstep compliance with the recordation and seizure requirements of Rule 56.4. The decision in *Freeman v. Superior Court*, 92 P.R.R. 1 (1965), is a good example. There, corporate shareholders aspired to block a real estate transaction on the ground that the defendant was not authorized to act on the corporation's behalf. *Id.* at 6-7. They obtained an interlocutory order forbidding the parties to the transaction from consummating it and served the order on the affected parties. In an ensuing challenge, the Supreme Court of Puerto Rico construed the order as a prohibition against alienation and concluded that it had become effective as to the parties in interest at the moment that it was served upon them, notwithstanding the plaintiffs' failure to record it. *Id.* at 21-22. That order "effectively and firmly secured" the "effectiveness of any judgment" that thereafter might be entered in the plaintiffs' favor. *Id.* at 22.

The decision in *Suarez v. Superior Court*, 85 P.R.R. 522 (1962), is cut from the same cloth. There, the trial court granted the plaintiff's motion to freeze the defendant's bank account. *Id.* at 523-24. The plaintiff served the defendant with notice of the freeze order, but neither seized the account nor deposited the passbook into the registry of the court. *Id.* at 524. On certiorari review, the Supreme Court of Puerto Rico determined that the order was "of the nature of a

prohibition to alienate" under Rule 56.4 and upheld it as against the defendant (who had actual notice). *Id.* at 529.

Freeman and *Suarez* share three salient similarities. In each case, the movant (the party procuring the prohibitory order) failed to comply with Rule 56.4's recordation or seizure requirements. Yet in each case, the movant timely apprised the complaining party of the court-imposed provisional remedy. And, finally, in each case the Supreme Court of Puerto Rico overlooked the lack of strict compliance with the requirements of Rule 56.4 because the complaining party had received actual notice of the prohibition in a timeous fashion.

Given these precedents, we decline to insist upon strict compliance here. As said, the underlying purpose of Rule 56.4's recordation and seizure requirements is to provide notice — and the present appellants plainly knew of the November 1995 orders well before they closed the transaction.[4] Consequently, there is no reason why the failure

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4. In December 1995, Goya sent via certified mail copies of the November 1995 orders, accompanied by an explanation of the legal context surrounding them, to 625 Park and Wallack Management. While no such mailing was directed to Rennert — Goya did not know of his existence until well after he had acquired the Apartment — Rennert has acknowledged that he too received copies of the orders "sometime in 1995 or early 1996." To cinch matters, the district court found that each of the appellants received timely notice of its 1997 decision holding that Charles was the beneficial owner of the cooperative shares (and, thus, of the Apartment), *Goya Foods, Inc. v. Unanue-Casal,* 982 F. Supp. at 111-12, and the appellants do not challenge this finding. Thus, each of the appellants had actual notice of the November 1995 orders and of their relationship to the Apartment and the cooperative shares.

to record the prohibition against alienation should blunt the legal force of the court's orders vis-à-vis the appellants.

The appellants attempt to convince us otherwise by reference to a pair of Puerto Rico cases.[5] In the first such case, *Stargus Properties v. Superior Court,* 101 P.R.R. 139 (1973), the trial court entered a standstill order effectuating "the prohibition to dispose of, or any condemnation proceeding over the property object of this litigation." *Id.* at 143. The defendants nonetheless sold a particular piece of property arguably affected by the order. Even though the defendants claimed not to have known about the standstill order and the plaintiff could provide no proof of service, the trial court found them in contempt. *Id.* at 144.

The Puerto Rico Supreme Court vacated the finding, concluding that the standstill order had not been "entered or processed according to the provisions of Rule 56 of the Rules of Civil Procedure." *Id.* at 146. In so holding, the court enumerated the order's myriad defects, including the fact that it had been issued sua sponte; that it completely failed to describe any specific properties; that the plaintiffs had

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5. The appellants also cite two bankruptcy court decisions. *See Quadrel Leasing de P.R., Inc. v. Carlos A. Rivera, Inc.* (*In re Carlos A. Rivera, Inc.*), 130 B.R. 377, 381-82 (Bankr. D.P.R. 1991); *FDIC v. Debtor & Trustee* (*In re Moscoso Villaronga*), 111 B.R. 13, 16 (Bankr. D.P.R. 1989). Neither case adds anything to the equation, and we decline to accord particular significance to these decisions. *See Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1151 (1st Cir. 1996) (explaining that a federal court applying state law must heed the "rules of substantive law enunciated by the state's highest judicial authority").

neglected to record the order in the Registry of Property; and that, in all events, the plaintiffs had not posted a proper bond. *Id.* at 146-47. These combined infirmities were so severe that it is difficult, if not impossible, to argue that the court attached decretory significance to the failure to record, standing alone. We conclude, therefore, that *Stargus* is sui generis, and that the decision does not stand for the broad proposition that the Puerto Rico Supreme Court always insists upon strict compliance with the recordation and seizure requirements of Rule 56.4.

The appellants' second case, *Cooperativa Central v. Flores*, 68 P.R.R. 672 (1948), involved an attachment of commercial goods owned by a merchant defendant. Pursuant to the trial court's order, a marshal inventoried the goods in the defendant's shop and designated a depository. *Id.* at 673. The court subsequently ordered the goods sold at public auction. *Id.* at 673-74. The Supreme Court of Puerto Rico halted the sale and voided the attachment on the ground that the goods were not *in custodia legis* (and, therefore, not properly seized) because the marshal lacked the authority to designate a depository. *Id.* at 675-76. Whatever *Flores* may teach as to how attachments of fungible goods must be handled — a matter on which we take no view — we do not read the decision as mandating, without exception, strict compliance with Rule 56.4. Indeed, it seems safe to conclude that the Puerto Rico Supreme Court's subsequent decision in *Suarez*, plainly relaxing Rule 56.4's technical seizure requirements, 85 P.R.R. at 529, trumps the appellants' proposed reading of *Flores*.

To sum up, *Stargus* and *Flores* cannot bear the weight that the appellants pile upon them. The case law teaches that strict compliance with the recordation and seizure requirements of Rule 56.4 is not essential in every case. Nor do we discern any other colorable argument supporting the appellants' position that the provisional remedies expired upon the district court's entry of judgment. While interlocutory orders sometimes may merge into a judgment, *e.g.*, *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998), it is unreasonable to assume that any such merger occurred here. After all, timely appeals ensued, and the district court specifically stayed the execution of the judgment pending the completion of those appeals.[6] *Goya Foods, Inc. v. Unanue-Casal*, 982 F. Supp. at 112. In a practical sense, the judgment rendered by the district court was not final until "the availability of appeal [was] exhausted." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987).

That ends this aspect of the matter. We reject the appellants' call for a mechanical construction of Rule 56.4 in favor of a flexible construction that recognizes the practicalities and the equities of individual situations. Following that path, we hold that a failure to comply with the recordation and/or seizure requirements of Rule 56.4,

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6. This stay comported with the practice in the commonwealth courts. *See* 32 P.R. Laws Ann. app. III, R. 53.9 (stipulating that the judgment of a Puerto Rico court is automatically stayed once it is appealed). Given this fact, it seems reasonable to assume that the Puerto Rico legislature did not intend provisional remedies issued under Rule 56.4 to expire automatically upon the entry of judgment in the trial court.

without more, does not render a court order containing a prohibition against alienation invalid as to a third party with actual notice of the terms of that restraint. Given the idiosyncratic circumstances of this case — especially the appellants' patent knowledge of the November 1995 orders and Goya's lack of a well-defined route for fulfilling Rule 56.4's recordation and seizure requirements[7] — we conclude that, even after the entry of judgment, the November 1995 orders continued to safeguard Goya's contingent interest in Charles's assets as to persons having actual knowledge of those orders, and that the Apartment and the cooperative shares remained subject to those orders when the appellants participated in the June 1998 transaction.

III. CIVIL CONTEMPT

We next address whether the district court's findings of civil contempt were properly grounded. This assessment

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7. The Apartment was located in New York City, so Goya was unable to file a cautionary notice in the Puerto Rico Registry of Property; and Goya likely was precluded from recording such a notice in New York's real estate records because New York law considers shares in a cooperative apartment to be personal property. *See In re Estate of Carmer,* 530 N.Y.S.2d 88, 89 (N.Y. 1988). It is equally problematic whether the shares could have been physically seized, or whether Goya, without Liliane's cooperation, could have perfected a UCC-9 filing in New York. *See* N.Y. U.C.C. § 9-203(1)(a) (1998). After all, Liliane not only fled the country but also defied other court orders to deposit assets in the registry of the court (e.g., the Emperor Equities shares). Whatever the answers to these questions, the absence of a straightforward methodology for satisfying the recordation and seizure requirements of Rule 56.4 represents an additional consideration that militates in favor of relaxing those requirements here.

employs multiple standards of review. We scrutinize the lower court's factfinding for clear error. *Project B.A.S.I.C. v. Kemp,* 947 F.2d 11, 15 (1st Cir. 1991). Withal, we evaluate its ultimate finding on contempt for abuse of discretion, approaching that inquiry "flexibly, with due regard for the circumstances." *Langton v. Johnston,* 928 F.2d 1206, 1220 (1st Cir. 1991). In performing that tamisage, we remain mindful that an error of law is the functional equivalent of an abuse of discretion. *In re Grand Jury Subpoena,* 138 F.3d 442, 444 (1st Cir. 1998).

The fact that the appellants were not parties to Goya's suit against the Unanues does not inoculate them against charges of civil contempt. Nonparties may be liable for civil contempt notwithstanding their nonparty status. *See Microsystems Software, Inc. v. Scandinavia Online AB,* 226 F.3d 35, 43 (1st Cir. 2000); *G. & C. Merriam Co. v. Webster Dictionary Co.,* 639 F.2d 29, 34-35 (1st Cir. 1980). The critical datum is whether the nonparty "was in active concert or participation with the party specifically enjoined." *Microsystems,* 226 F.3d at 43. To satisfy that criterion, "the nonparty must be legally identified with that defendant, or, at least, deemed to have aided and abetted that defendant in the enjoined conduct." *Id.*

Here, the district court rested its contempt finding upon an "aiding and abetting" theory. The legal underpinning of such a theory is impeccable: it has long been recognized that a nonparty may be held in civil contempt if, and to the extent that, he knowingly aids or abets an enjoined party in transgressing a court order. *See, e.g., Gemco Latinoamérica, Inc. v. Seiko Time Corp.,* 61 F.3d 94, 98 (1st Cir. 1995).

The question, then, reduces to whether the district court's deployment of the theory finds sufficient footing in the record.

There are two elements essential to invocation of this theory. The first is state of mind: a nonparty must know of the judicial decree, and nonetheless act in defiance of it. The second is legal identification: the challenged action must be taken for the benefit of, or to assist, a party subject to the decree. Here, both elements are foregone conclusions.

It cannot be gainsaid that each of the appellants had actual knowledge of the November 1995 orders. *See supra* note 4. This constitutes a solid foundation for the district court's finding that the appellants possessed the requisite state of mind to trigger civil contempt liability.

The appellants attempt to confess and avoid. They admit knowledge of the November 1995 orders, but asseverate that they lacked the requisite state of mind because they honestly believed that those orders had lapsed. This asseveration is unpersuasive.

When a legitimate question exists as to the scope or effectiveness of a court's order, those who know of the decree, yet act unilaterally, assume the risk of mistaken judgments. *See Infusaid Corp. v. Intermedics Infusaid, Inc.*, 756 F.2d 1, 2 (1st Cir. 1985) (emphasizing that a party who harbors "doubt about the lawfulness of a proposed course of action" always can "ask the district court for guidance"). Adhering to this principle, the appellants could have asked the district court for clarification as to the enduring vitality of the

November 1995 orders, but they eschewed that course. They chose instead to rely on their own judgment as to whether the orders remained in effect. In so doing, the appellants acted at their peril. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

The identification element is similarly open-and-shut. Liliane Unanue was a party to the underlying action and, thus, a person subject to the November 1995 orders. The record here permits no reasonable conclusion but that the appellants aided and abetted Liliane's violation of those orders. After all, each of the three appellants played an essential role in consummating the forbidden transaction. Wallack Management offered the Apartment for sale, located a purchaser, and shepherded the transaction to its climax. 625 Park facilitated the sale by placing its imprimatur on the transfer of the Apartment and the cooperative shares. Rennert purchased the Apartment and the shares from Liliane, and executed an indemnity agreement in order to induce others to approve the transaction. In view of these actions, we must uphold the district court's finding that each of the appellants knowingly aided and abetted a party's (Liliane Unanue's) defiance of the November 1995 orders.

Given the foregoing, the conclusion seems inescapable that the appellants are susceptible to liability for civil contempt. The appellants nonetheless attempt to refute this conclusion, protesting that they acted throughout in good faith. The district court gave this protestation short shrift, and so do we.

The law is firmly established in this circuit that good faith is not a defense to civil contempt. *Star Fin. Servs., Inc. v. AASTAR Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996); *accord McComb*, 336 U.S. at 191 ("An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."). The appellants fail to advance any sound reason why this rule should not apply to nonparties. For our part, we perceive no principled basis for allowing nonparties (but not parties) to invoke a good-faith defense. We hold, therefore, that nonparties are not entitled to raise a good-faith defense in a civil contempt proceeding.

In a related vein, the appellants note that a contempt finding will not lie unless the putative contemnor violates a court order that is clear and unambiguous. *Kemp*, 947 F.2d at 16. Starting from this premise, the appellants contend that the uncertainty surrounding the effectiveness of the November 1995 orders prevents Goya from fulfilling this requirement. Their contention is wide of the mark.

The test is whether the putative contemnor is "able to ascertain from the four corners of the order precisely what acts are forbidden." *Gilday v. Dubois*, 124 F.3d 277, 282 (1st Cir. 1997) (citation omitted). Focusing the test within the four corners of a document limits the inquiry to an examination of that document's text. *E.g., United States v. Anderson*, 921 F.2d 335, 337-38 (1st Cir. 1990). Thus, the "clear and unambiguous" standard applies to the *language* of the relevant court order, not to its effectiveness. *See Star Fin. Servs.*, 89 F.3d at 13 (concentrating on the "unequivocal language" of the relevant order). This is as it should be.

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Were we to honor the appellants' thesis — that cobbling together a plausible legal argument about the effectiveness of an order renders the order unclear or ambiguous for contempt purposes — we would contradict our precedents emphasizing that the "clear and unambiguous" inquiry is limited to the four corners of the order itself. Consequently, we reject the appellants' attempt to widen the lens of this inquiry to include uncertainties about the legal efficacy of the November 1995 orders (apart from those that might be inherent in the language of the orders).

Turning to the language of the orders, it is difficult to imagine how the November 1995 orders could have been worded in a clearer, more unambiguous way. Those ukases plainly forbade not only the Unanues but also "their agents, employees, and all persons . . . acting in concert with them" from "alienating or in any way assigning, transferring, selling, or otherwise disposing or encumbering [the Apartment,] including [the] cooperative shares [associated therewith]." This language leaves no room for doubt as to what the court intended.

The last piece of the puzzle is the requirement that the moving party establish by clear and convincing evidence that the putative contemnor violated the relevant court order. *Kemp,* 947 F.2d at 16; *Langton,* 928 F.2d at 1220. Here, the appellants left behind an extensive paper trail memorializing the events leading up to the transfer of the Apartment and the shares, and that documentary array constitutes overwhelming proof that they knowingly participated in a transaction expressly prohibited by the November 1995 orders.

The appellants do not seriously question this conclusion, but, rather, insist that the lower court was obliged to hold an evidentiary hearing before it could find, by clear and convincing evidence, that the appellants had abridged the November 1995 orders. This insistence is misplaced. In conjunction with the show-cause order, Goya introduced documentary evidence that established what the appellants knew, when they knew it, and the nature of the various actions that they took.[8] The appellants failed to contradict this evidence. The record, therefore, disclosed no genuine issue of material fact as to the appellants' roles. Given that void, an evidentiary hearing would have been a waste of time. *See Morales-Feliciano v. Parole Bd.*, 887 F.2d 1, 6-7 (1st Cir. 1989) (explaining that a party has a right to an evidentiary hearing in a civil contempt proceeding only if, and to the extent that, genuine issues of material fact exist).

That ends our discussion of the liability issue. For the reasons elucidated above, we conclude that the district court did not abuse its discretion in finding the appellants in civil contempt.

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8. The evidence showing that the appellants chose to participate in bringing about the transfer of the Apartment and the cooperative shares despite their actual knowledge of the ukases prohibiting that very eventuality included a memorandum written by Wallack Management's chief executive officer in March 1998 indicating his awareness that an operative restraint "presently" prohibited Liliane Unanue from selling the Apartment; 625 Park's steadfast refusal to consummate the sale unless and until Rennert agreed to indemnify it against potential liability; and the confidentiality clause through which Liliane and the appellants attempted to sweep the entire transaction under the rug.

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IV. CONTEMPT SANCTIONS

The court below initiated the civil contempt proceeding under its inherent power. *See Shillitani v. United States,* 384 U.S. 364, 370 (1966). Its authority to assess a sanction for contempt derives from the same source. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980). A trial court has wide discretion in its choice of sanctions. *Ray v. Eyster (In re Orthopedic "Bone Screw" Prods. Liab. Litig.),* 132 F.3d 152, 156 (3d Cir. 1997). Once the trial court has chosen a particular sanction, appellate review is for abuse of discretion. *EEOC v. Local 28 of Sheet Metal Workers Int'l Ass'n,* 247 F.3d 333, 336 (2d Cir. 2001); *R.I. Hosp. Trust Nat'l Bank v. Howard Communications Corp.,* 980 F.2d 823, 829 (1st Cir. 1992). When money is the sanction of choice, the abuse of discretion standard pertains not only to the trial court's selection of the sanction but also to its quantification of the award. *Rolex Watch U.S.A., Inc. v. Crowley,* 74 F.3d 716, 721 (6th Cir. 1996); *Eck v. Dodge Chem. Co. (In re Power Recovery Sys., Inc.),* 950 F.2d 798, 802-03 (1st Cir. 1991).

Federal courts are empowered to issue civil contempt sanctions to "protect[ ] the due and orderly administration of justice and . . . maintain [ ] the authority and dignity of the court." *Roadway Express,* 447 U.S. at 764. In a civil contempt proceeding, a monetary sanction, assessed for the purpose of compensating the complainant for losses sustained by reason of the contemnor's acts, is within the universe of permissible sanctions. *See United States v. United Mine Workers,* 330 U.S. 258, 303-04 (1947). Thus, make-whole

relief is a commonplace sanction for civil contempt. So too are normal embellishments such as attorneys' fees and costs. *G. & C. Merriam,* 639 F.2d at 41.

The amount of an award of make-whole relief, like the amount of any monetary sanction that is remedial in nature, cannot be plucked out of thin air. The amount of such a sanction must be established by competent evidence, and must bear a reasonable relationship to the actual losses sustained by the injured party. *United Mine Workers,* 330 U.S. at 304.

In this case, the lower court crafted a sanction with the evident purpose of compensating the complainant for losses sustained in consequence of the contemnors' violation of the November 1995 court orders. To be specific, the court assessed a compensatory sanction in the amount of $4,600,000 (the price paid for the Apartment), and then tacked on roughly $1,400,000 in prejudgment interest. As we explain below, the peculiar path that the court took in arriving at the latter figure needlessly complicated the matter.

We take first things first. The appellants' argument that the base amount assessed was inherently speculative, or grossly excessive, or both, is without merit. We rejected a similar argument in *Gemco Latinoamérica,* a case in which a nonparty bank had helped to arrange payments that violated an outstanding attachment. 61 F.3d at 98. The district court held the bank in civil contempt and imposed a sanction in the form of money damages. *Id.* We affirmed both the court's choice of a monetary sanction and its use of the funds that had been diverted as a measure of the amount. *Id.* at 98-100.

In reaching this result, we explained that the bank's facilitative role made it "responsible for the full effect" of the dissipated funds. *Id.* at 100. That precedent is instructive here.

Goya held a valid judgment against Charles Unanue, and the district court had determined, in a decision since affirmed by this court, that the judgment could be partially enforced by levying against the Apartment and the cooperative shares. Goya's opportunity to execute against those assets was frustrated by the surreptitious sale and the subsequent transfer of the lion's share of the proceeds to a Swiss bank account. The appellants each played a facilitative role in consummating that forbidden transaction. Under the circumstances, the value of the vanished assets, as reflected by the purchase price actually paid in the contumacious transaction, strikes us as an equitable yardstick for measuring Goya's loss. *See id.* at 98, 100 (calculating damages for contemnor's illegal seizure of store's inventory based upon purchase price offered by a willing buyer); *cf. Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 20 (1st Cir. 1979) (basing monetary contempt sanction upon contemnor's actual sales). We hold, therefore, that the district court acted well within the realm of its discretion in awarding Goya the base sum of $4,600,000.

This leaves the question of prejudgment interest. If the purpose of remedial contempt sanctions is to make an aggrieved party whole, then it follows that a court should be able to fashion sanctions that take into account not only the actual loss stemming from the contumacious conduct but also the time value of any associated deprivation of funds. Accordingly, we hold that prejudgment interest, as a theoretical

matter, is an acceptable component of a remedial sanction for civil contempt. *See generally McComb*, 336 U.S. at 193 ("The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief.").

Despite this holding, the award of prejudgment interest, as rendered in the case at bar, is problematic. The court opted to apply Puerto Rico's prejudgment interest rule, 32 P.R. Laws Ann. app. III, R. 44.3(b), lock, stock, and barrel to determine whether prejudgment interest should be granted, and if so, in what amount. In charting this course, the court seems to have lost sight of the fact that it was operating under the aegis of its inherent power, and instead approached the sanctions issue as if it were issuing an award of damages in, say, a tort action.

The genesis of this decision is not clear. We note, however, that the original action was brought by Goya under the court's diversity jurisdiction. *See* 28 U.S.C. § 1332(a). We think it likely, therefore, that the district court relied upon precedents teaching that, in diversity cases, state law determines "whether and how much pre-judgment interest should be awarded." *Fratus v. Republic W. Ins. Co.*, 147 F.3d 25, 30 (1st Cir. 1998); *see also Comm'l Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 774 (1st Cir. 1994) (stating that a federal court sitting in diversity jurisdiction ordinarily should apply the law that a local court sitting in the forum state would deem controlling in respect to prejudgment interest).

The difficulty is that the *Fratus* rule is inapposite here. Given that the district court convened the contempt proceeding under its inherent power, the court was free to award prejudgment interest as part and parcel of the contempt sanction, or to decline to do so, *as a matter of federal law.* The Puerto Rico rule simply was not controlling.[9]

The beacon by which we must steer is the Supreme Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). There, the district court, sitting in diversity jurisdiction, invoked its inherent power and assessed attorneys' fees as a sanction for bad-faith conduct during the litigation. *Id.* at 40-42. Before the Supreme Court, the sanctioned party contended that the trial judge was not free to order the payment of attorneys' fees as a sanction for bad-faith conduct unless applicable state law recognized such a praxis. The Court rejected this contention, explaining that since the trial judge based the fee award on the sanctioned party's conduct during the course of the litigation, the use of federal law as the source of authority for the award did not contravene the *Erie* principle. *Id.* at 51-53 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). Extrapolating from *Chambers*, we hold that when a federal district court sits in diversity jurisdiction, its inherent power to impose monetary

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9. Of course, the federal court, had it desired to make an interest award, could have drawn upon any reasonable statutory benchmark (state or federal) to set an appropriate rate. *See Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 224-25 (1st Cir. 1996) (observing that courts fashioning awards under ERISA may use either state or federal rates in computing discretionary awards of prejudgment interest). But, this was not what the district court did.

sanctions for contumacious conduct during the course of litigation is not circumscribed by the forum state's law regarding the imposition of sanctions. *Accord People by Abrams v. Terry,* 45 F.3d 17, 23-24 (2d Cir. 1995). We see no reason why this principle should not apply *ex proprio vigore* to prejudgment interest when such an award is imposed as part of a civil contempt sanction in a federal district court.

Based on the foregoing, we decline the parties' joint invitation to confront the difficult, nuanced question of whether the facts of record here bring this case within the confines of Rule 44.3(b). Rather, we strike the district court's award of prejudgment interest under that rule. But we do not stop there. Although the district court employed the wrong vehicle en route to an award of prejudgment interest, it plainly intended to afford make-whole relief by taking into account, to some extent, the time value of money. Under the circumstances, and in fairness to the parties, we think that the court is entitled to reconsider the question of remedies in light of our holding.

We view the district court's options as broad. On the one hand, it may decide to leave well enough alone ($4,600,000 is, after all, a substantial amount of money). On the other hand, it may decide that the equities counsel in favor of some increase in the base award to compensate Goya for the time value of the vanished purchase price. The parties have not briefed these issues, and we believe that it should be open to them and to the lower court, on remand, to explore such potential modifications to the judgment. *E.g., FDIC v.*

Consol. Mortgage & Fin. Corp., 805 F.2d 14, 21 (1st Cir. 1986) (remanding issue neither briefed nor argued on appeal for further consideration).

V. CONCLUSION

We need go no further. For the reasons stated, we affirm the judgment in part, vacate it in part, and remand for further proceedings consistent with this opinion. As to those anticipated proceedings, we intimate no view of either the propriety or the wisdom of any particular outcome.

Affirmed in part, vacated in part, and remanded. Two-thirds costs are taxed in favor of the appellee.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED MAY 4, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civ. No. 95-2411(JAF)

GOYA FOODS, INC.,

Plaintiff,

v.

ULPIANO UNANUE-CASAL, A/K/A CHARLES UNANUE; LILIANE UNANUE; AND KALIF TRADING, INC.,

Defendants.

GOYA FOODS INC.,

Plaintiff,

v.

WALLACK MANAGEMENT CO., INC., 625 PARK CORPORATION, AND IRA LEON RENNERT,

Respondents.

May 4, 2001.

Appendix B

OPINION AND ORDER

FUSTE, District Judge.

We are confronted with yet another chapter in the long-standing dispute between Plaintiff Goya Foods, Inc. ("Goya"), and Defendants Charles and Liliane Unanue. Plaintiff Goya seeks an order holding Respondents, Ira Leon Rennert ("Rennert"), Wallack Management Co., Inc. ("Wallack Management"), and 625 Park Corporation, in civil contempt for violating this court's Orders which prohibited alienation of an apartment nominally owned by Liliane Unanue. *Docket Document No. 345.*

I.

Factual and Procedural Background

We derive the following factual synopsis from our October 31, 1997 Opinion and Order, *Goya Foods, Inc. v. Unanue-Casal*, 982 F.Supp. 103 (D.P.R. 1997), and the First Circuit's November 28, 2000 Opinion affirming our Judgment, *Goya Foods, Inc. v. Unanue-Casal*, 233 F.3d 38 (1st Cir. 2000).

Prudencio Unanue, the father of Defendant Charles Unanue, founded Goya in the 1930s. Charles Unanue served as a chief officer of Goya from the late 1940s until 1969. In 1969, prior to the death of his father, a dispute arose between Charles Unanue and his brothers, who were supported by their father, Prudencio Unanue. As a result of the conflict, Charles Unanue was removed from his position

as an officer and director of Goya and its various affiliated companies. This event set the stage for a series of lawsuits amongst the siblings.

In 1972, the parties tried to settle their differences by reaching an agreement (1972 Agreement) under which Charles Unanue received certain payments in return for selling his shares in the Goya companies. A year later, Charles Unanue claimed that the other parties to the 1972 Agreement had breached it. In 1974, the parties amended the agreement (1974 Amendment). In addition to selling his ownership interest in all of the Goya companies, Charles Unanue agreed never to bring any claim or suit contesting or objecting to his father's will or trust, and not to interfere with the disposition of assets of stock by his father, his estate, the beneficiaries, or his brothers. The 1974 Amendment also specified that any signatory to the amended stipulation who lost a suit with another signatory concerning Prudencio Unanue's will or trust had to pay the winner liquidated damages of double costs and attorneys' fees. By 1976, Goya had paid Charles Unanue more than $4.4 million for his share of the Goya corporations pursuant to the 1972 Agreement and the 1974 Amendment.

In 1987, eleven years after Prudencio Unanue's death, Charles Unanue demanded from his brothers his share of his parents' estate.[1] Joseph and Frank Unanue, as trustees of their father's trust, sued Charles Unanue in the Superior Court of New Jersey. They sought a declaratory judgment barring Charles Unanue from maintaining any claims against their

1. Charles Unanue claims that his share of the estate is currently worth approximately $450 million. *Docket Document No. 358.*

father's estate and trust as agreed upon in the 1974 Amendment. In 1995, a New Jersey trial court entered judgment against Charles Unanue and his bankruptcy estate, *see infra,* and the court ordered Charles to pay liquidated damages totaling $6.9 million pursuant to the 1974 Amendment. *See In re Unanue,* No. M-128817, slip op. (N.J. Super. Ct. Ch. Div. Feb. 23, 1995). The New Jersey appellate court later affirmed the judgment. 311 N.J. Super. 589 (App.Div.), *cert. denied,* 157 N.J. 541 (1998).

Meanwhile, Charles Unanue had filed for bankruptcy in Puerto Rico in 1990. Goya initiated adversary proceedings in the bankruptcy case, claiming that assets held in the names of Charles' wife, Liliane, and two companies, Emperor Equities, Inc., and Kalif Trading, Inc. ("Kalif Trading"), were actually owned by Charles. Emperor Equities, Inc., is a Delaware corporation entirely owned by Liliane Unanue. Charles created Kalif Trading, a Panamanian corporation, in 1979. In 1995, the bankruptcy court dismissed Charles' case without awarding him a discharge. *In re Unanue-Casal,* No. 90-04490, slip op. at 5 (Bankr. D.P.R. Sept. 12, 1995).

In November 1995, Goya brought the present action in the United States District Court for the District of Puerto Rico against Charles Unanue, his wife Liliane Unanue, and Kalif Trading, to collect on the $6.9 million New Jersey judgment. Goya alleged that Charles Unanue was the beneficial owner of all property held in the names of Liliane and Kalif Trading.

Appendix B

On November 17, 1995, this court issued an Order prohibiting alienation of certain properties held by Defendants, including Apartment 10A at 625 Park Avenue in New York City. *See Docket Document No. 5.* On that same day, we issued another Order prohibiting alienation of the cooperative shares pertaining to the Park Avenue apartment. *Docket Document No. 9.* The cooperative apartment at 625 Park Avenue had been purchased in the name of Liliane Unanue in 1976. Charles and Liliane used the Park Avenue apartment as their New York residence from 1976 until 1998. *Docket Document No. 345.* Respondent 625 Park Corporation is the cooperative housing corporation that owns the 625 Park Avenue building, and Respondent Wallack Management is the managing agent for 625 Park Corporation. *Id.*

In a letter dated December 1, 1995, Goya informed Respondents 625 Park Corporation and Wallack Management that this court had "entered Orders prohibiting Liliane Unanue and others from transferring, alienating or encumbering certain properties held in the name of Liliane Unanue and others until the litigation is resolved." *Id.* at Exh. C. The letter further notified 625 Park Corporation that it should not allow any transfer of any ownership interest in Apartment 10A. *Id.* The information regarding the November 17, 1995 Orders was passed along to Respondent Rennert on December 11, 1995. *Id.* at Exh. D.

In July 1997, this court held a 10-day bench trial. On October 31, 1997, we issued an Opinion and Order in which we found that Charles Unanue was the beneficial owner of properties in Puerto Rico, New York, Spain, and France, that were held in the name of Liliane Unanue. *See Goya Foods,*

Inc. v. Unanue-Casal, 982 F.Supp. 103, 109 (D.P.R. 1997). We recognized Goya's right to execute judgment against several properties held in Liliane's name, including the Park Avenue apartment. *Id.* at 106, 112. This court stayed final execution of the judgment pending review by the First Circuit and the New Jersey appellate courts. *Id.* at 112.

In September 1997, Burton Wallack ("Wallack"), who is the president and co-owner of Respondent Wallack Management and a director and officer of Respondent 625 Park Corporation, wrote a letter to Liliane Unanue regarding a possible sale of Apartment 10A. *Docket Document No. 345, Exh. E.* Charles Unanue had apparently consented to sell the apartment, and Wallack agreed to serve as real estate broker for the sale in exchange for a 6% commission. *Id.*

Liliane Unanue responded to Wallack and informed him about the November 17, 1995 Orders. *Id.* at Exh. F. Liliane's letter, dated September 9, 1997, states the following:

> I will not be able to sell the apartment until I have authorization to do so from the U.S. District Court in Puerto Rico which has imposed an *ex parte* provisional attachment which was opposed, along with other matters, in a recent trial.
>
> . . . .
>
> . . . [U]ntil I am in a position to do so, no commitment has been made to sell the apartment and it will not be shown until my right to sell it is unchallenged.
>
> *Id.*

Appendix B

In February 1998, Wallack sent Liliane a letter of default regarding her failure to make required maintenance payments. *Id.* at Exh. I. Wallack informed Liliane that unless she cured her default of $24,802, the cooperative housing corporation would terminate her lease and take possession of Apartment 10A. *Id.* Liliane Unanue then filed an emergency motion requesting permission from this court to sell the Park Avenue apartment to pay the outstanding maintenance, taxes and upkeep on the apartment. *Docket Document No. 378, Exh. E.* We ordered counsel for Unanue and Goya to meet to discuss alternative solutions to the problem of Liliane's default. *Id.*

On February 28, 1998, Goya notified Wallack regarding this court's Opinion and Order dated October 31, 1997. *Docket Document No. 345, Exh. J.* The letter stated:

> In his decision, Judge Fuste held, among other things, that Charles Unanue rather than Liliane Unanue was the true beneficial owner of the Apartment. Accordingly, the court held that Goya is entitled to enforce its judgment by levying against "any residence registered to [Liliane Unanue's] name," which would include this Apartment.

Id. Goya asked to be notified about any potential action to be taken regarding the Unanues' interest in Apartment 10A, and Goya included copies of our Opinion and Order as well as our Judgment in the correspondence. *Id.* Respondent Rennert also obtained copies of the same. *Docket Document No. 345.*

Meanwhile, the Unanues consulted their attorney, Jan Alan Brody, about the notice of default Wallack had sent to Liliane. *Id.* In Brody's March 13, 1998 written correspondence to Wallack, the attorney recognized that this court's November 17, 1995 Orders prohibited alienation of Apartment 10A: "Mrs. Unanue plans on selling her proprietary shares; however, there is presently a restraint against her alienation of such shares entered in a proceeding before the United States District Court for the District of Puerto Rico." *Id.* at Exh. K. Brody informed Wallack about the emergency motion filed by Liliane requesting an order granting her permission to sell the cooperative shares pertaining to the apartment, or directing that Goya pay the arrears and maintenance on the apartment while the restraint on alienation remained in effect. *Id.*

Wallack responded to Brody's letter on the same day, March 13, 1998. *Id.* at Exh. L. Wallack asked to be notified "of the Court's decision as outlined in your letter." *Id.*

On May 10, 1998, Liliane Unanue agreed to sell Apartment 10A to Respondent Rennert for $4.6 million. *See id.* at Exh. M. Prior to his acquisition of Apartment 10A at 625 Park Avenue, Rennert already owned the entire eleventh floor of the building and the only other apartment on the tenth floor. *Docket Document No. 345.* Rennert sought to expand his penthouse to encompass the entire tenth and eleventh floors of 625 Park Avenue. *Docket Document No. 372.*

Around May 22, 1998, Liliane Unanue retained attorney Samson Bechhofer of Herrick Feinstein L.L.P., to draw up a

contract of sale. *Docket Document No. 345.* Counsel for Respondent Rennert, Fredric Altschuler of Cadwalader, Wickersham & Taft, sent copies of this court's Orders and Judgment to Bechhofer. *Id.* After reviewing the Orders and Judgment, Bechhofer determined that this court had prohibited the sale of Apartment 10A, and the proposed transfer to Rennert could not lawfully proceed. *Docket Document No. 378, Exh. H.* On June 3, 1998, Herrick Feinstein L.L.P. withdrew from representing Liliane because Bechhofer believed the sale of Apartment 10A would violate this court's Orders. *Id.* Goya contends that Bechhofer also informed Altschuler of his view. *Docket Document No. 345.* Liliane ultimately had to seek alternative representation for the transfer.

Prior to the closing, Rennert's attorneys prepared a title search, which disclosed that Goya had not recorded any cautionary notice or filed a Uniform Commercial Code (UCC) statement in New York state against the cooperative shares pertaining to Apartment 10A. *Docket Document No. 372, Exh. K.* Both the attorneys for Rennert and those for 625 Park Corporation independently concluded that this court's Orders prohibiting alienation of the apartment had lapsed at the entry of Judgment against the Unanues, and that there were no effective restraints prohibiting transfer of the property to Rennert. *Docket Document No. 372.*

Under the Bylaws and Proprietary Leases of 625 Park Corporation, the corporation's board of directors must approve any transfer of an apartment in the building. *Docket Document No. 345.* After consulting with counsel, 625 Park Corporation approved the sale of Apartment 10A to Rennert

on the condition that Rennert indemnify 625 Park Corporation for any damages and litigation expenses that might arise if Goya challenged the sale.[2] *Id.* at Exh. N. At the closing of the sale, Respondent Rennert executed the following letter of indemnification:

> In consideration of the consent of 625 Park Corporation (the "Corporation") to the transfer of the Apartment to me, I hereby indemnify and hold harmless the Corporation, its officers, directors, shareholders and managing agent from and against any actions, claims, damages or costs (including reasonable attorney's fees and costs) incurred or suffered by such person as a result of any claim by Goya Foods, Inc. in the action entitled *Goya Foods, Inc. v. Ulpiano Unanue Casal u/k/a Charles Unanue, Liliane Unanue, and Kalif*

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2. A June 18, 1998 letter from attorney Richard Siegler of Stroock & Stroock & Lavan L.L.P. to 625 Park Corporation stated:

> Provided that the Corporation receives the annexed indemnification letter executed by Mr. Rennert, the Corporation should transfer the shares and proprietary lease for the Apartment from Ms. Unanue to Mr. Rennert. As provided in the Board resolution adopted on June 11, 1998 conditionally approving the transfer of the Apartment as indicated above, this letter is intended to evidence the view of this firm that the Corporation is adequately protected from liability resulting from such transfer based upon the indemnification letter being provided to the Corporation by Mr. Rennert in the form attached.

Docket Document No. 345, Exh. N.

Trading, Inc. with Index No. 95-2411 (U.S.Dist.Ct., P.R.) or any action or proceeding connected thereto.

Id. at Exh. R.

On June 19, 1998, Liliane Unanue sold the cooperative shares pertaining to Apartment 10A at 625 Park Avenue to Rennert and his wife, Ingeborg Rennert, for $4.6 million in cash. *Id.* at Exh. O. Wallack Management acted as Liliane's real estate broker and agent, and made the necessary arrangements for the closing. *Docket Document No. 378, Exh. G.* Upon Charles' instructions, Rennert wired $4.2 million of the purchase price directly into Liliane's account at Credit Suisse Bank in Lausanne, Switzerland. *Docket Document No. 345, Exh. P.* Liliane also received a check for $9,904.50. *Id.* at Exh. S. Wallack Management received a brokerage commission of $276,000, constituting 6% of the purchase price. *Id.* This $276,000 amount was included in the $4.6 million purchase price. Wallack Management also received a corporation transfer tax of $92,000, which constituted 2% of the purchase price and was paid in addition to the $4.6 million purchase price.[3] *Id.*

Following the closing, Charles and Liliane Unanue kept possession of Apartment 10A for a few months under an agreement with the Rennerts. *Docket Document No. 345.*

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3. Goya maintains that 625 Park Corporation, not Wallack Management, received the $92,000 transfer fee. *Docket Document No. 345.* However, the closing statement shows that Wallack Management received the corporation transfer tax, and Goya has submitted a photocopy of a $92,000 check drawn on Rennert's account made out to Wallack Management. *Id.* at Exh. S.

After the Unanues left, the Rennerts undertook construction to expand their penthouse to include Apartment 10A. *Id.*

The contract of sale of the Park Avenue apartment included a confidentiality clause. *Id.* at Exh. O. Goya did not obtain evidence that the transfer had occurred until October 11, 2000. *Docket Document No. 345.*

On October 20, 2000, this court ordered Defendants Charles and Liliane Unanue to personally appear before the court and show cause why they should not be held in contempt for violating the November 17, 1995 Orders prohibiting alienation of the Park Avenue apartment. *Docket Document No. 331.* Charles and Liliane Unanue failed to appear at the show cause hearing held on October 31, 2000. *Docket Document No. 334.* We found Charles and Liliane in civil contempt, and this court issued warrants for their arrest. *Id.* On that same day, this court ordered execution of the judgment entered against Defendants on November 5, 1997. *Docket Document No. 336.* Charles and Liliane Unanue have failed to comply with numerous court orders and are currently living as fugitives in Europe. *Docket Document No. 378.*

On November 28, 2000, the United States Court of Appeals for the First Circuit affirmed our October 31, 1997 judgment. *Goya Foods, Inc. v. Unanue*, 233 F.3d 38, 48 (1st Cir. 2000). Based on a constructive trust theory, the First Circuit affirmed our finding that the properties held in Liliane's name were actually owned by Charles. *Id.* at *45.* Under the equitable theory of constructive trust, a third-party creditor is permitted to execute judgment on assets that are actually owned by the debtor but are held in another person's name. *Id.* The appellate court held that the constructive trust

doctrine could be applied to real properties that had been identified in this litigation, including the Park Avenue apartment in New York City. *Id. at 42 n. 3, 46.*

On February 22, 2001, we granted Goya's motion for an Order directing Defendants to pay the proceeds from the sale of the Park Avenue apartment to Goya or into the registry of this court. *Docket Document No. 343.* Defendants failed to do so.

Goya filed a motion requesting that the court issue an Order for Respondents Rennert, Wallack Management, and 625 Park Corporation to show cause why they should not be held in contempt for participating in the alienation of the Park Avenue apartment in violation of our November 17, 1995 Orders. *Docket Document Nos. 344, 345.* On February 23, 2001, we granted Goya's request. *Docket Document No. 359.* Respondents filed briefs in opposition to Goya's motion to hold them in contempt, *Docket Document Nos. 372, 373,* and Goya filed a reply, *Docket Document No. 378.* Respondents filed a sur-reply, *Docket Document Nos. 384, 385.* We held a show cause hearing on April 3, 2001.

II.

Analysis

Goya moves for an adjudication of civil contempt against Respondents Rennert, Wallack Management, and 625 Park Corporation. *Docket Document No. 345.* Goya seeks compensatory damages of $4,600,000, plus interest, costs, and attorneys' fees. *Id.* Goya also requests that this court order Respondents to transfer to Goya sums by which Respondents

have been unjustly enriched by their contumacious acts, including the $92,000 transfer fee, and any profit that Rennert may receive from a subsequent resale of Apartment 10A. *Id.*

A.

Courts enjoy a broad inherent contempt power to ensure compliance with court orders and judgments. *See Int'l Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 831 (1994).

> The traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. . . ." Courts thus have embraced an inherent contempt authority . . . as a power "necessary to the exercise of all others."

Id. (internal citations omitted). "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers,* 330 U.S. 258, 303 (1947).

Civil contempt will lie only if the complainant can establish by clear and convincing evidence that a contemnor violated a court order. *See Gemco Latinoamerica, Inc. v. Seiko Time Corp.,* 61 F.3d 94, 98 (1st Cir. 1995). The underlying order must be clear and unambiguous in its terms. *Project B.A.S.I.C. v. Kemp,* 947 F.2d 11, 15 (1st Cir. 1991). Courts

may hold nonparties in contempt if the nonparty is "legally identified with that defendant, or, at least, deemed to have aided and abetted that defendant in the enjoined conduct." *Microsystems Software, Inc. v. Scandinavia Online AB,* 226 F.3d 35, 43 (1st Cir. 2000).

Goya argues that Respondents Rennert, Wallack Management, and 625 Park Corporation are all liable for contempt for knowingly participating in the alienation of Apartment 10A in violation of court orders. *Docket Document No. 345.*

B.

On November 17, 1995, this court issued an Order Prohibiting Alienation of Properties of Defendants. *Docket Document No. 5.* The Order stipulated:

> Plaintiff, having moved the Court for provisional remedies to secure satisfaction of judgment pursuant to Articles 112 and 113 of the Mortgage Law of 1979, 30 L.P.R.A. § 2401 and 2404, Rule 64 of the Federal Rules of Civil Procedure[4]

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4. Rule 64 of the Federal Rules of Civil Procedure provides:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner

(Cont'd)

and Rule 56 of the Puerto Rico Rules of Civil Procedure[5], the Court, having found that provisional remedies are necessary to secure enforcement of any judgment which may be rendered against defendants in this case, it is hereby

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(Cont'd)

> provided by the law of the state in which the district court is held, existing at the time the remedy is sought. . . .The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Fed.R.Civ.P. 64.

5. Rule 56.1 of the Puerto Rico Rules of Civil Procedure reads:

> In every action, before or after entering judgment, and on motion of claimant, the court may issue any provisional order it may deem necessary to secure satisfaction of the judgment. The court may order the attachment, garnishment, the prohibition to alienate, claim and delivery of personal property, receivership, an order to do or to desist from doing any specific act, or it may order any other measure it deems necessary, according to the circumstances of the case. In every case in which a provisional remedy is sought, the court shall consider the interests of all the parties and shall adjudicate as substantial justice may require.

32 L.P.R.A. app. III. R. 56.

Appendix B

ORDERED that defendants, their agents, employees, and all persons holding property for them or acting in concert with them, are prohibited from alienating or in any way assigning, transferring, selling or otherwise disposing or encumbering any of the real properties, including cooperative shares, listed below:

. . . .

2. Apartment 10A at 625 Park Avenue, New York, New York, cooperative shares pertaining to which are held in the name of Liliane Unanue.

. . . .

This order is granted *ex parte,* the Court having found that exigent circumstances exist, as amply shown in plaintiff's moving papers and, in particular, the documentary evidence submitted therewith, including the transcripts of Bankruptcy Rule 2004 examinations where certain of the defendants refused to answer questions regarding the origin, ownership and transfer of assets.

Docket Document No. 5.

That same day, this court issued a parallel Order specifically prohibiting alienation of the cooperative shares pertaining to the Park Avenue Apartment. *Docket Document No. 9.* That Order provided, in part:

[I]t is hereby ORDERED that defendant Liliane Unanue, her agents, employees, and all persons

> holding property for her or acting in concert with her, are prohibited from alienating or in any way assigning, transferring, selling or otherwise disposing or encumbering any of the cooperative shares pertaining to Apartment 10A at 625 Park Avenue, New York, New York, or her ownership interest in the premises represented by those shares.

Id.

Goya avers that since Respondent Wallack Management served as Liliane's real estate broker and was her agent, Respondent Wallack Management is directly bound by the November 17, 1995 Orders. *Docket Document No. 345.* In addition to acting as Liliane's agent, Wallack Management arranged the closing of the sale in its capacity as management company for 625 Park Corporation. *Id.* Thus, Goya argues that Wallack Management violated this court's Orders and should be held in contempt. *Id.*

Goya contends that Respondent 625 Park Corporation should be held in contempt for knowingly acting in concert with the Unanues to violate this court's Orders prohibiting alienation of the Park Avenue apartment. *Id.* Goya stresses that 625 Park Corporation approved the transfer of Apartment 10A to Rennert, and the corporation instructed its managing agent, Wallack Management, to consummate the sale. *Id.*

Goya submits that Respondent Rennert should be held in contempt for purchasing Apartment 10A. *Id.* As the buyer, Goya posits that Rennert was an indispensable party to the transaction that was expressly prohibited by this court's Orders. *Id.*

Appendix B

Respondents concede that they had knowledge of the November 17, 1995 Orders before the sale of Apartment 10A. *Docket Document No. 383.* Respondents also had timely notice of our October 31, 1997 Opinion and Order holding that Charles Unanue, not Liliane, was the beneficial owner of Apartment 10A, as well as timely notice of the Judgment entered in favor of Goya.[6] Respondents maintain that they did not violate any order of this court, and therefore should not be held in contempt. *Docket Document No. 372.* Respondents argue that Goya cannot establish by clear and convincing evidence that the order was clear and unambiguous, that they violated any order, that they acted in bad faith, and that Goya is entitled to any damages. *Id.* Respondents Wallack Management and 625 Park Corporation also argue that their fiduciary duties to Rennert compelled 625 Park Corporation to consent to the transfer of Apartment 10A. *Docket Document No. 383.*

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6. Although Respondents do not expressly concede this point, Goya notified Wallack Management about our Opinion and Order in February 1998. *Docket Document No. 345, Exh. J.* We impute knowledge to the other Respondents based on the legal opinions given by counsel for Rennert and 625 Park Corporation to their clients that the transfer of Apartment 10A was lawful because the November 17, 1995 Orders had lapsed upon entry of Judgment in favor of Goya on November 5, 1997. *See Docket Document No. 372.* ("[Respondents] proceeded with the transaction only after [Rennert's] attorneys and the attorneys for 625 Park Corporation independently came to the conclusion that there was no restraint against the Cooperative Shares and that Goya had failed to take any steps to block the transfer of the Cooperative Shares upon the entry of a judgment in the action against the Unanues.")

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C.

Respondents aver that the November 17, 1995 Orders were not in effect in June 1998, when the sale of Apartment 10A occurred, because Goya did not perfect the Orders pursuant to Rule 56.4 of the Puerto Rico Rules of Civil Procedure.[7] *Id.* Respondents argue that since Goya did not perfect the Orders, the Orders lapsed upon entry of judgment on November 5, 1997. *Id.* Respondents also point out that Goya did not take any alternative steps pursuant to the UCC to perfect a lien in securities. *Id.* Respondents claim that provisional relief issued pursuant to Rule 56 survives a final judgment only if the attachment has been perfected. *Id.*

Goya maintains that it did not levy on Apartment 10A and the Unanues' other U.S. assets immediately after Judgment was entered on November 5, 1997, because this court stayed enforcement of the judgment pending appellate review. *Docket Document No. 378.* Moreover, Goya argues that even if the judgment had not been stayed, it could not

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7. The rule reads:

> If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of prohibition to alienate. The attachment and prohibition to alienate real property shall be effected by recording them with the Registry of Property and notifying the defendant. In case of personal property, the order shall be carried out by depositing the personal property in question in court or with the person designated by it under the claimant's responsibility. . . . 32 L.P.R.A. app. III. R. 56.4.

record a cautionary notice in the Registry of Property of Puerto Rico to memorialize the entry of this court's Orders restraining the alienation of a property located in New York City. *Id.* In addition, Goya posits that it could not record a notice of pendency against the Park Avenue apartment in the registry of property of New York, because Liliane Unanue held title to Apartment 10A in the form of cooperative shares pertaining to the apartment. *Id.* Goya contends that since the 625 Park Avenue building is owned as a cooperative, under New York law, it could not record a notice of pendency against Apartment 10A. *Id.* Goya also avers that it could not make a filing pursuant to UCC Article 9 of a nonconsensual judicial order. *Id.*

Although Goya did not seize the stock certificate pertaining to the cooperative shares from Liliane Unanue, Goya argues that the purpose of such a seizure would be to protect innocent third parties. *Docket Document No. 383.* Goya maintains that this purpose was served by giving notice of the Orders prohibiting alienation to Respondents. *Id.* Goya's position is that "the methodology of enforcing prohibitions to alienate through the vehicle of recording or seizure is designed to provide additional protection to the plaintiff beyond that provided by the order itself — not to represent a procedural hurdle voiding the restraint if it cannot readily be complied with."

Docket Document No. 378.

A provisional order prohibiting alienation of a property may remain in effect after entry of judgment in favor of the party to be protected by the provisional remedy, in this case, Goya. This court issued the Orders prohibiting alienation to

protect Goya's interest and "to secure satisfaction of the judgment." *See* P.R.R.CIV.P. 56.1. These Orders were issued ex parte following a preliminary assessment of the evidence presented by Goya. After a full trial in which both Unanues received the opportunity to testify and present their case, we entered Judgment in favor of Goya on November 5, 1997. Our Orders remained effective after entry of judgment even though Goya did not record them with the Registry of Property or deposit the cooperative shares with the court or a designated receiver.

We hold that where a nonparty has actual knowledge of an order prohibiting alienation of a certain property, the nonparty may be held in civil contempt for violating the order even if there has not been recordation (in the case of real property) or seizure (in the case of personal property).[8]

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8. The November 17, 1995 Orders issued by this court were titled "Order Prohibiting Alienation of Properties of Defendants" and "Order Prohibiting Alienation of Cooperative Shares," respectively. *Docket Document Nos. 5, 9.* These Orders were obviously orders prohibiting alienation of property, not orders of attachment.

Rule 56.1 lists "attachment" and "prohibition to alienate" as separate provisional remedies that may be used to protect a future judgment. P.R.R. CIV. P. 56.1. An "attachment" is defined as "[t]he seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." BLACK'S LAW DICTIONARY 123 (7th ed. 1999). An order prohibiting alienation of property bars the owner from selling the property to another. Under Puerto Rico law, an attachment is directed to the U.S. Marshal, not to the defendants. *Quiros-Lopez v. Unanue-Casal (In re Unanue-Casal),* 998 F.2d 28, 32 (Bankr. 1st Cir. 1993). Here, the November 17, 1995 Orders prohibiting alienation were directed at the Unanues and those acting in concert with them, not the U.S. Marshal.

(Cont'd)

Appendix B

Respondents cannot argue that they participated in the transfer of Apartment 10A to a bona fide purchaser who had no knowledge of the Orders and Judgment issued by this court.

Our holding that the Orders prohibiting alienation were in effect in June 1998 is consistent with the expansive power courts enjoy to design provisional remedies to effectuate judgments.

> Rule 56 of the Rules of Civil Procedure confers upon the court sufficient flexibility to issue the measures which it deems necessary or convenient, according to the circumstances of the case, to secure the effectiveness of the judgments. Its only limitation is that the measure be reasonable and adequate to the essential purpose of the same, which is to guarantee the effectiveness of the

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(Cont'd)

Respondents cite *Quadrel Leasing de P.R., Inc. v. Rivera, Inc. (In re Rivera, Inc.)*, 130 B.R. 377 (Bankr. D.P.R. 1991), *FDIC v. Debtor (In re Moscoso Villaronga)*, 111 B.R. 13 (Bankr. D.P.R. 1989), and *Perez Guerra v. Matos Bernier, 48 P.R. Offic. Trans.*, 582 (1935), for the proposition that provisional relief issued pursuant to Rule 56 survives a final judgment only if the attachment has been perfected. Respondents' reliance on these cases is unavailing, since those cases related to attachments of property, not orders prohibiting alienation. *In re Rivera*, 130 B.R. at 378, *In re Moscoso Villaronga*, 111 B.R. at 14, *Perez Guerra*, 48 P.R. Offic. Trans. at 582. We note that In re Moscoso Villaronga related to an "Order of Attachment, Garnishment and Seizure, and Prohibition to Alienate" issued by this court. 111 B.R. at 15. Since the opinion only discussed the attachment, not the prohibition to alienate portion of the order, we find that the case is not persuasive. *Id.* at 15-17.

> judgment which in due time may be rendered. *This flexibility, so necessary for the administration of justice, is the greatest virtue of Rule 56, virtue which we should promote and preserve instead of mystifying it with technical concepts and requirements.*

HMG Prop. Investors, Inc. v. Parque Indus. Rio Canas, Inc., 847 F.2d 908, 914 (1st Cir. 1988) (emphasis added) (citing *F.D. Rich Co. v. Superior Court*, 99 P.R.R. 155, 173 (1970)).

An examination of the factual background of this case reveals that both the Unanues and Respondents understood that the Orders prohibiting alienation remained in effect after entry of judgment.

In February 1998, following entry of judgment in favor of Goya in November 1997, Liliane Unanue filed an emergency motion with this court seeking permission to sell the Park Avenue apartment. *Docket Document No. 378, Exh. E.* Liliane was concerned about the notice of default Wallack had sent to her regarding her unpaid arrears. We responded to Liliane's emergency motion by ordering the attorneys on both sides to discuss alternative solutions to prevent repossession of Apartment 10A by 625 Park Corporation. *Id.*

In March 1998, Jan Alan Brody, counsel for the Unanues, drafted a letter to Wallack, stating that there was presently a restraint prohibiting Liliane from transferring her cooperative shares. *Docket Document No. 345, Exh. K.* Brody informed Wallack about the emergency motion filed by Liliane for

permission to sell her apartment. *Id.* Wallack immediately responded to Brody's letter, requesting notification of this court's decision on Liliane's emergency motion. *Id.* at Exh. L.

The February 1998 motion and Brody's March 1998 correspondence with Wallack show that Liliane understood that the Orders prohibiting alienation were in effect at that time, even though judgment had been entered in favor of Goya the previous year. Wallack's March 1998 letter indicates that he believed there was an operative restraint prohibiting Liliane from selling Apartment 10A, and that it was necessary for the court to grant Liliane's emergency motion for her to lawfully sell the residence.

Moreover, Respondent 625 Park Corporation only approved the transfer of Apartment 10A after obtaining a letter of indemnification from Rennert. *Docket Document No. 345, Exh. N.* Rennert indemnified 625 Park Corporation and Wallack Management from damages, attorneys' fees, and costs that might be incurred if Goya challenged the sale. *Id.* at Exh. R. The letter of indemnification specifically listed the caption and case number of the present case. *Id.* The indemnification letter constitutes compelling evidence that Respondents were aware of the possible illegality of the sale and their intent to allocate that risk among themselves.

Furthermore, Liliane Unanue was unusually insistent that the transfer of the Park Avenue apartment remain a secret. Liliane's sale of the apartment was contingent upon there being complete secrecy surrounding the transfer. *Docket Document No. 345, Exh. M.* The contract of sale included a

confidentiality clause barring the parties from disclosing the transaction to any third person other than the party's own attorney. *Id.* at Exh. O. The parties involved with the sale of Apartment 10A were so successful at keeping the transfer a secret that Goya did not obtain evidence that the transfer had occurred until October 11, 2000. *Docket Document No. 345.*

Respondents cite *Stargus Props. v. Superior Court*, 101 P.R. Offic. Trans. 139 (1973), as a case in which the court found that a defendant was not in contempt despite its violation of an order prohibiting alienation, because the order had not been perfected in accordance with Rule 56.4. *Docket Document No. 372.* In *Stargus*, the trial court had issued an order on May 24, 1971, prohibiting alienation of real properties which were the subject of a contract dispute.[9] *Id.* at 143. Subsequently, the real properties were sold by defendants to third persons. *Id.* The trial court found defendants to be in civil and criminal contempt. *Id.* at 143-44.

The Supreme Court of Puerto Rico determined that the May 24, 1971 order was void because the order was seriously deficient in multiple respects. *Id.* at 146. First, Rule 56.1. states that the court may issue provisional remedies "on motion of claimant." P.R.R. CIV. P. 56.1. In *Stargus*, the trial court issued the order sua sponte, without being

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9. The order stated: "By virtue of Rule No. 56 of the Rules of Civil Procedure in force, this Court orders the prohibition to dispose of, or of any condemnation proceeding over the property object of this litigation." *Id.* at 143.

prompted to do so by the interested party. *Id.* at 147. Second, the record did not show that the interested parties had recorded the prohibition to alienate in the Registry of Property and notified the defendant pursuant to Rule 56.4. *Id.* at 147. Third, the bond that had been given as required by the order was defective. *Id.* The bond had not been sworn to and signed by the surety, and it was not accompanied with an affidavit showing that the surety owned properties worth twice the amount of the bond. *Id.* Fourth, the order was tenebrous in that it did not refer to any specific real properties that were to be subject to the order. *Id.* For these reasons, the Puerto Rico Supreme Court set aside the trial court's finding that defendants were in contempt for violating the May 24, 1971 order. *Id.* at 148.

Stargus can easily be distinguished from the instant case. The Supreme Court of Puerto Rico invalidated the order of prohibition of alienation in *Stargus* because the order was plagued with multiple deficiencies. Three of the four problems cited by the Puerto Rico Supreme Court in *Stargus* are not present here. We issued the November 17, 1995 Orders in response to an urgent motion by Goya for ex parte provisional remedies to secure satisfaction of judgment. *See Docket Document No. 2.* Respondents do not contend that there were any defects with the bonds filed by Goya in accordance with the Orders. The Orders clearly identified each and every property that was subject to the prohibition of alienation.

The only defect in this case was that Goya did not record the prohibition to alienate with the Registry of Property or deposit the cooperative shares pertaining to Apartment 10A

with the court or a designated receiver. We doubt whether the Puerto Rico Supreme Court in *Stargus* would have invalidated an order of prohibition of alienation that had been afflicted with one minor deficiency, instead of four separate defects. Recordation and seizure measures are designed to notify the defendant(s) and third parties about the order prohibiting alienation. Even though Goya did not formally record the Orders prohibiting alienation with the Registry of Property or deposit the cooperative shares, Respondents had knowledge of the Orders as well as of the Judgment in favor of Goya. *Docket Document No. 383.* In contrast, there is no indication in *Stargus* that the defendants had notice of the order prohibiting alienation prior to the sale of the real properties. Thus, the instant case differs substantially from the situation presented to the Puerto Rico Supreme Court in *Stargus*, and we need not follow its result.

D.

Respondents aver that they should not be held in contempt because the November 17, 1995 Orders were not clearly and unambiguously in effect in June 1998. *Docket Document No. 372.* Respondents submit that there was ambiguity as to the continued duration and effect of the Orders, thus entitling Respondents to conclude that the Orders had lapsed upon entry of the Judgment. *Id.*

Respondents' contention is meritless. The language of the November 17, 1995 Orders is pellucid. The Orders are directed at Defendants Charles and Liliane Unanue, Charles' alter ego Kalif Trading, and "their agents, employees, and all persons holding property for them or acting in concert

with them." *Docket Document Nos. 5, 9.* The Orders prohibited these persons from alienating any of the listed properties, including Apartment 10A at 625 Park Avenue. *Id.* There was no language in the Orders indicating that they would lapse upon entry of a judgment in favor of Goya.

If Respondents had desired clarification from this court about the effectiveness of the Orders so as to avoid being held in contempt, they could have asked this court for guidance about the lawfulness of alienating Apartment 10A prior to closing the sale. *See Star Fin. Servs. v. Aastar Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996) ("[T]he wording of the order was clear and unambiguous and . . . if there were any doubts, clarification or modification from the court should have been sought."); *Infusaid Corp. v. Intermedics Infusaid, Inc.*, 756 F.2d 1, 2 (1st Cir. 1985) ("[W]hen in doubt about the lawfulness of a proposed course of action, [a party or nonparty] can ask the district court for guidance."). Respondents failed to do so.

E.

Respondents argue that they did not aid and abet the Unanues in committing contemptuous conduct. *Docket Document No. 372.* Respondents contend that they cannot be found to be aiders and abettors in contempt of this court's Orders because they lacked the requisite state of mind: they did not believe that the sale of Apartment 10A violated any court order. *Id.* Respondents underscore that the transfer of the Park Avenue apartment only took place after counsel for Rennert and for 625 Park Corporation had independently concluded that there was no effective restraint prohibiting alienation of the cooperative shares. *Id.*

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Since Respondents are nonparties, this court may hold them in contempt only if we find that they are legally identified with the Unanues or that they aided and abetted the Unanues in committing the prohibited conduct. *Microsystems Software*, 226 F.3d at 43. The alleged good faith of Respondents does not prevent this court from finding that they aided and abetted in the Unanues' flouting of the November 20, 1995 Orders. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."); *Star Fin. Servs., Inc. v. Aastar Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996) (finding that good faith does not excuse civil contempt).

All of the Respondents acted as necessary parties in the violation of this court's Orders. As the buyer, Rennert paid the $4.6 million for Apartment 10A and then indemnified 625 Park Corporation for any damages or litigation expenses arising from the disputed transfer. As a result, Rennert was able to expand his penthouse apartment to include all of the tenth and eleventh floors of 625 Park Avenue. 625 Park Corporation gave the necessary approval for the sale, and directed its management company, Wallack Management, to arrange the sale. Both 625 Park Corporation and Wallack Management gained financial rewards as a result of the transfer. We find that Respondents clearly aided and abetted the Unanues in violating this court's Orders prohibiting alienation of the Park Avenue apartment.

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F.

Respondents 625 Park Corporation and Wallack Management further argue that the cooperative housing corporation had a fiduciary duty to treat all its shareholders, including Rennert, fairly. *Docket Document No. 373.* 625 Park Corporation has always given its consent whenever a shareholder in good standing has sought to buy an additional apartment in the building to enlarge the shareholder's residence. *Id.* Rennert is a shareholder in good standing. *Id.* According to Respondents 625 Park Corporation and Wallack Management, if the cooperative housing corporation had not approved of Rennert's proposed purchase of Apartment 10A, it would have exposed itself to liability for breach of its fiduciary duty to its shareholders. *Id.* Furthermore, Respondent 625 Park Corporation argues that "it wasn't just that the corporation could proceed with the transaction, it really had to proceed with the transaction. Because, as a fiduciary, it really wasn't a matter of choice; it was a matter of responsibility to the shareholder." *Docket Document No. 383.* Respondents 625 Park Corporation and Wallack Management submit that 625 Park Corporation consented to the transfer of Apartment 10A in the good faith exercise of its fiduciary duty to Rennert. *Docket Document No. 373.*

We reject Respondents' audacious and absurd contention that 625 Park Corporation's fiduciary duties to Rennert required its violation of our unambiguous Orders prohibiting a sale of Apartment 10A. It is plain that a corporation may not commit an act prohibited by law and then justify its unlawful behavior by citing its fiduciary duties to one of its shareholders.

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G.

Respondents argue that Goya has not established that it is entitled to any damages or attorneys' fees. *Docket Document No. 372.* Respondents maintain that Goya has not shown that the sale of Apartment 10A caused it to suffer any damages. *Id.*

One of the purposes of civil contempt proceedings is to compensate the complainant for losses suffered. *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 40 (1st Cir. 1980).

Here, Goya won a $6.9 million judgment against Charles Unanue in a New Jersey trial court in February 1995. Including interest, that judgment is now worth approximately $8.5 million. *Docket Document No. 378.* Charles Unanue deliberately hid his assets under the names of his wife and other entities, and to date, no part of the judgment has been paid to Goya. *Docket Document No. 345.* Goya is in the process of levying against an apartment held by one of Charles Unanues' alter egos in San Juan, Puerto Rico, but the value of the apartment falls well below the value of the judgment obtained against Charles Unanue. *Id.* The Park Avenue apartment is the most valuable asset that can be used to satisfy judgment against Charles. *Docket Document No. 378, Exh. E.*

Goya has been damaged by Respondents' contemptuous conduct to the full extent of the purchase price paid by Rennert. If Respondents had complied with the Orders, they could have undertaken the same transfer at a later date with the

court's permission, so long as Goya received the proceeds of the sale. Since Respondents aided and abetted the Unanues in the transfer of Apartment 10A at 625 Park Avenue in violation of this court's Orders, we hereby **ORDER** that Respondents pay into the registry of this court for the benefit of Goya the $4.6 million purchase price of the apartment, plus interest, costs, and attorneys' fees. The obligation to pay is joint and several among Wallack Management, 625 Park Corporation, and Ira Rennert. The $4.6 million deposit shall be made on or before May 11, 2001. Movants shall file their bill of costs and a verified accounting of attorneys' fees by May 11. Thereafter, the court will promptly address those pending items and direct Respondents to deposit additional moneys to comply with this court's Order. Failure to pay will result in the immediate issuance of a federal warrant for the arrest of Ira Rennert until payment is made.

III.

Conclusion

In accordance with the foregoing, we hereby **HOLD** Respondents Rennert, Wallack Management, and 625 Park Corporation in **CIVIL CONTEMPT** for violating this court's November 17, 1995 Orders prohibiting alienation of Apartment 10A at 625 Park Avenue in New York City.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 4th day of May, 2001.

s/ Jose Antonio Fuste
Jose Antonio Fuste
U. S. District Judge

Supreme Court, U.S.
FILED
SEP 11 2002
OFFICE OF THE CLERK

(2)

No. 02-246

IN THE

Supreme Court of the United States

WALLACK MANAGEMENT CO., INC.,
625 PARK CORPORATION,
and IRA LEON RENNERT,

Petitioners,

v.

GOYA FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider Petitioners' challenge to their civil contempt liability to pay compensation for violating two express orders of the United States District Court, where Petitioners had undisputed actual knowledge of those orders but knowingly chose to participate in a transaction unambiguously forbidden by the orders, and where the specific legal issue raised by Petitioners would affect no other litigants but arose from a complex, fact-bound procedural history and what the Court of Appeals termed "idiosyncratic circumstances."

2. Whether this Court should grant certiorari to review the lower courts' construction of Rule 56.4 of the Puerto Rico Rules of Civil Procedure, a matter governed entirely by Puerto Rico local law and raising no federal question, much less an important one.

PARTIES TO THE PROCEEDING

The parties to this case are Wallack Management Co., Inc., 625 Park Corporation, and Ira Leon Rennert as Petitioners, and Goya Foods, Inc. as Respondent.

The petition states that Ulpiano Unanue-Casal a/k/a Charles Unanue, Liliane Unanue, and Kalif Trading, Inc. have been served as respondents. (Pet. iii) While those litigants were parties to the underlying action in the United States District Court for the District of Puerto Rico, they were not parties to the third-party contempt proceeding that Goya Foods, Inc. brought against Petitioners in the District Court, and they were not parties to Petitioners' appeal from the District Court's contempt adjudication against them to the United States Court of Appeals for the First Circuit.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Goya Foods, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Respondent, Goya Foods, Inc. ("Goya"), respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

PRELIMINARY STATEMENT

Petitioners were rightly held in civil contempt because, despite their undisputed actual knowledge of two District Court orders in Goya's favor which prohibited the sale or transfer of a luxury cooperative apartment in Manhattan, as well as of a subsequent District Court order confirming that the prohibition remained in effect, Petitioners each played an indispensable role in a sale of the apartment in 1998 for $4,600,000 in cash. Strikingly, Petitioners were so well aware that Goya would bring contempt proceedings against them once the sale came to light that they contracted for the sale to be kept secret. They also negotiated and executed an indemnification and hold-harmless letter under which one Petitioner agreed to defend the others against the inevitable litigation and to pay the judgment that might be awarded against them on Goya's claim.

In response to Goya's contempt application, Petitioners raised a technical argument that the orders prohibiting alienation of the apartment were no longer in effect in 1998, based on their disregard of the clear purpose and intent of the orders and their misunderstanding of the Puerto Rico Rule of Civil Procedure under which the orders were entered. The District Court and the United States Court of Appeals for the First Circuit each independently evaluated Petitioners' argument and rejected it as unsupported by either the purpose of the orders and the rules authorizing them or by the Puerto Rico caselaw interpreting those rules. The courts also found that Goya had established all the remaining elements

necessary to hold Petitioners in civil contempt: although Petitioners were non-parties to the underlying action, they had acted in concert with the named defendants in a transaction that violated court orders of which they were actually aware, aiding and abetting the named defendants' contempt of those orders, and thereby causing Goya damages for which Petitioners were required to compensate Goya in the civil contempt proceeding.

In their petition for certiorari, Petitioners seek to raise two issues. The first of these challenges the compensatory civil contempt adjudication against Petitioners. The petition, however, does not allege any violation of this Court's decisions, any conflict of lower-court decisions or widespread uncertainty as to the law of civil contempt, or any unsettled but important issue of federal law warranting this Court's attention. All that is involved is the application of generally settled law to a *sui generis* procedural context and what the Court of Appeals aptly called "the idiosyncratic circumstances of this case." (Pet. App. 18a)

The petition's second issue challenges the Court of Appeals' analysis of an issue arising under Rule 56.4 of the Puerto Rico Rules of Civil Procedure. On its face, this is an issue of Puerto Rico local law and is thus, by definition, unsuited for this Court's review on certiorari. Petitioners attempt to bootstrap their Puerto Rico law argument, which was cogently rejected by both lower courts, into a federal issue by claiming that the Court of Appeals' detailed analysis of Puerto Rico Supreme Court caselaw reached an incorrect result and therefore violated the *Erie* doctrine. That is woefully insufficient to raise an important issue of federal law.

Because this case meets none of this Court's standards for granting review, and the lower courts engaged in a legally correct analysis to reach an entirely just result, certiorari should be denied.

STATEMENT OF THE CASE

The relevant facts and procedural history are cogently set forth in the opinions below. (*See* Pet. App. 3a-8a (Court of Appeals opinion), 33a-44a (District Court opinion)) Therefore, they need be summarized only briefly here.

A. The District Court Enters the Orders Prohibiting Alienation of Apartment 10A

In November 1995, Goya commenced an action in the United States District Court for the District of Puerto Rico (the "Puerto Rico Action"). In that action, Goya sought to enforce a $6,900,000 New Jersey state-court judgment it had previously obtained against defendant Charles Unanue, by obtaining a determination that certain assets nominally held in the names of third parties actually belonged to Charles. Among these assets was a luxury cooperative apartment located at 625 Park Avenue in New York, New York ("Apartment 10A"), the cooperative shares corresponding to which were held in the name of Charles' wife, defendant Liliane Unanue.

At the outset of the Puerto Rico Action, Goya asked United States District Judge José Antonio Fusté to enter provisional remedy orders prohibiting the alienation of various assets belonging to defendants, including Apartment 10A. Judge Fusté granted this relief and entered orders prohibiting defendants Charles and Liliane Unanue and their

"agents, employees, and all persons holding property for them or acting in concert with them" from "alienating or in any way assigning, transferring, selling or otherwise disposing or encumbering" Apartment 10A (the "Orders Prohibiting Alienation"). (*See* Pet. 46a-49a (quoting the orders)) The Orders Prohibiting Alienation were entered pursuant to Fed. R. Civ. P. 64, which provides that such remedies "for the purpose of securing satisfaction of the judgment ultimately to be entered in the action" may be granted in accordance with forum-state law, and Rules 56.1 and 56.4 of the Puerto Rico Rules of Civil Procedure.

Goya immediately served the Orders Prohibiting Alienation on defendants Charles and Liliane Unanue. To ensure that the orders would be effective, Goya also sent copies of the orders to Petitioner 625 Park Corporation ("625 Park"), the cooperative corporation that owns the building and grounds at 625 Park Avenue, via the building's managing agent, Petitioner Wallack Management Company, Inc. ("Wallack Management"). Because the approval of 625 Park's board of directors is a prerequisite to any sale or transfer of an apartment in the building, Goya's placing 625 Park on notice of the Orders Prohibiting Alienation was a step reasonably calculated to prevent any transfer from taking place.

Because of "the idiosyncratic circumstances of this case," including Apartment 10A's status as a cooperative (so that its ownership was formally represented as shares of stock in the cooperative corporation, rather than as real estate) and its location outside Puerto Rico, it was impossible or impracticable for Goya to take additional steps to memorialize the orders, such as recording the Orders Prohibiting Alienation in any real property registry or

physically seizing any associated asset. (*See* Pet. App. 5a n.1, 18a & n.7) Accordingly, the Orders Prohibiting Alienation contained no language requiring Goya to take these steps, and the defendants did not challenge the orders for failing to require them. Nonetheless, it is undisputed that by December 1995, as a result of the notification provided by Goya, the three Petitioners — Wallack Management, 625 Park, and Ira Leon Rennert (who was a resident, shareholder, officer, director, and Executive Committee member of 625 Park) — all had actual knowledge of the Orders Prohibiting Alienation. (*See, e.g.*, Pet. App. 5a-6a, 14a, 36a-37a, 50a) Confirming Petitioners' knowledge, in September 1997, about two years after the Orders Prohibiting Alienation were first entered, Liliane wrote to Burton Wallack (an officer and director of both 625 Park and Wallack Management), reiterating that the orders prohibited any sale or transfer of Apartment 10A. (Pet. App. 37a)

After discovery proceedings and a 10-day trial of the Puerto Rico Action, in October 1997, Judge Fusté handed down his decision in Goya's favor, holding that Apartment 10A, among other assets, was beneficially owned by Charles Unanue and therefore subject to execution to satisfy Goya's New Jersey judgment against him. *Goya Foods, Inc. v. Unanue-Casal*, 982 F. Supp. 103 (D.P.R. 1997). However, Judge Fusté stayed execution of his judgment until defendants' appeals from both his decision and the underlying New Jersey judgment were resolved. *Id.* at 112 (*see also* Pet. App. 5a-6a, 37a).[1] In February

1. In due course, the Court of Appeals affirmed the District Court's judgment in Goya's favor, specifically including its directive that Goya's judgment could be enforced against Apartment 10A. *Goya Foods, Inc. v. Unanue-Casal*, 233 F.3d 38, 42 n.3 (1st Cir. 2000), *cert. denied*, 532 U.S. 1022 (2001). Earlier, the New Jersey state appellate courts had affirmed the underlying $6.9 million money judgment against Charles. (Cont'd)

1998, Petitioners were notified of Judge Fusté's decision in Goya's favor and provided with copies of Judge Fusté's opinion and judgment (including the stay pending appeal). (Pet. App. 5a-6a, 38a) Goya's letter forwarding these documents to Petitioners, like its earlier letter transmitting the Orders Prohibiting Alienation themselves, invited Petitioners to contact Goya's counsel if they needed any further information, and asked Petitioners to notify them of any proposed transfer of Apartment 10A. (*See* Pet. App. 6a, 38a) Petitioners never did so.

B. The District Court Confirms that the Orders Remain in Force in 1998

Shortly thereafter, also in February 1998, Liliane Unanue asked the District Court to modify the Orders Prohibiting Alienation so that she could sell Apartment 10A. This was one of a long series of motions that defendants in the Puerto Rico Action had filed seeking to vacate or modify the Orders Prohibiting Alienation and various other provisional remedy orders entered in the case.

In response to Liliane Unanue's motion, Judge Fusté directed counsel for Liliane and for Goya to meet to discuss alternatives that might allow Liliane to sell the apartment while preserving Goya's ability to enforce its judgment, and report back to him the results of that meeting. On March 13, 1998, Liliane Unanue's attorney, Jan Alan Brody, wrote to Wallack stating:

> Mrs. Unanue plans on selling her proprietary shares [in Apartment 10A]; however, *there is*

(Cont'd)
Matter of Unanue, 311 N.J. Super. 589, 710 A.2d 1036 (App. Div.), *cert. denied*, 157 N.J. 541, 724 A.2d 801 (1998), *cert. denied*, 526 U.S. 1051, *rehearing denied*, 526 U.S. 1140 (1999).

> *presently a restraint against alienation of such shares* entered in a proceeding before the United States District Court for the District of Puerto Rico. In response to Mrs. Unanue's emergency motion for leave to sell the shares or, in the alternative, directing the plaintiff in that action, Goya Foods, Inc., to pay all of the arrears and future maintenance while *the restraint on alienation remains in effect*, the Court entered an order on March 9, 1998 directing counsel for the parties to meet to discuss a sale or payment of the arrears and future maintenance by Goya Foods, Inc. within five (5) days and *to report back to the Court so that it may make a final decision.*

(*See* Pet. App. 6a, 38a-39a (emphasis added)) Wallack wrote back to Brody the same day, asking that he "notify me of the Court's decision [on Liliane Unanue's motion] as outlined in your letter." (*See id.*) Thus, Wallack Management and 625 Park knew that Liliane Unanue, her attorney, and most importantly, the District Court itself all understood five months *after* the judgment in Goya's favor was entered that any sale of Apartment 10A *was still prohibited* — and would remain so unless and until the court vacated the Orders Prohibiting Alienation, which never occurred.

C. Petitioners Participate in the Transfer of Apartment 10A Notwithstanding the Orders

Nonetheless, in April 1998, Liliane Unanue retained Wallack Management to act as her real estate broker in a sale of Apartment 10A. In May, Rennert agreed to buy Apartment 10A from Liliane for $4,600,000. Although the lawyer Liliane retained to represent her in the sale withdrew

upon learning of the Orders Prohibiting Alienation — and became the second lawyer for Liliane (along with Brody) to advise Petitioners that Apartment 10A could not lawfully be sold (Pet. App. 6a n.2, 39a-40a) — the parties proceeded with the transaction.

In June 1998, Rennert asked 625 Park's board of directors to approve his acquisition of Apartment 10A, a prerequisite to closing the sale. Normally this would have been a routine step inasmuch as Rennert already owned several other apartments in the building and was one of 625 Park's officers, directors, and Executive Committee members. In this instance, however, as a condition to granting its approval, the 625 Park board required that Rennert *indemnify* 625 Park and Wallack Management from all damages and litigation expenses they might incur based on claims that Goya would assert in this very action. (Pet. App. 7a, 41a) Rennert signed the indemnification demanded by 625 Park, which provided:

> In consideration of the consent of 625 Park Corporation (the "Corporation") to the transfer of the Apartment [10A] to me, I hereby indemnify and hold harmless the Corporation, its officers, directors, shareholders and managing agent [Wallack Management] from and against any actions, claims, damages or costs (including reasonable attorney's fees and costs) incurred or suffered by such person as a result of any claim by Goya Foods, Inc. in the action entitled *Goya Foods, Inc. v. Ulpiano Unanue Casal a/k/a Charles Unanue, Liliane Unanue, and Kalif Trading, Inc.* with Index No. 95-2411 (U.S. Dist. Ct., P.R.) or any action or proceeding connected thereto.

(Pet. App. 41a-42a)

The sale of Apartment 10A closed on June 19, 1998. On that date, at Charles and Liliane Unanue's direction, Rennert wired $4,200,000 of the $4,600,000 purchase price to a bank account in Liliane's name in Lausanne, Switzerland. (Pet. App. 42a) The Unanues' obvious purpose in directing this transfer was to thwart Goya's subsequent ability to recover the proceeds from the sale in later proceedings. At the closing, Wallack Management received $276,000 as its commission for acting as Liliane's real estate agent, and 625 Park received $92,000 as an apartment transfer fee. Rennert and his wife subsequently annexed Apartment 10A to their existing residence at 625 Park, which already included the only other apartment on the 10th floor and the entire 11th floor. (Pet. App. 42a-43a)

D. Petitioners Are Held in Contempt

Rennert and Liliane agreed in the Contract of Sale that the sale of Apartment 10A would be kept confidential, and Goya did not learn of it until October 2000. (Pet. App. 7a, 43a, 57a) When Goya advised Judge Fusté of the sale, he directed Charles and Liliane Unanue to appear before him and show cause why they should not be held in contempt. Charles and Liliane failed to appear as ordered, and the court issued warrants for their arrest. Charles and Liliane also ignored a court order to pay the $4,600,000 sale proceeds to Goya or into court. For the past two years, Charles and Liliane have been fugitives from justice residing in France. *See Goya Foods, Inc. v. Unanue-Casal*, 275 F.3d 124 (1st Cir. 2001), *petitions for cert. filed*, Nos. 02-339 and 02-366 (U.S. Sept. 2002).

In January 2001, Goya commenced this compensatory civil contempt proceeding against the three Petitioners. After briefing and argument, the District Court held Petitioners in

contempt for knowingly violating the Orders Prohibiting Alienation, in a detailed opinion that carefully considered and rejected each of Petitioners' defenses to liability, and awarded Goya compensatory damages of $4,600,000, the amount Rennert paid for Apartment 10A. *Goya Foods, Inc. v. Unanue-Casal (Wallack Management Co.)*, 141 F. Supp. 2d 207 (D.P.R. 2001) (Pet. App. 32a-64a).

Petitioners appealed to the United States Court of Appeals for the First Circuit, which affirmed Judge Fusté's contempt adjudication and the $4,600,000 contempt award, in a comprehensive opinion by Circuit Judge Bruce M. Selya, joined by Senior Circuit Judge Frank M. Coffin and Circuit Judge Kermit V. Lipez. *Goya Foods, Inc. v. Wallack Management Co.*, 290 F.3d 63 (1st Cir. 2002) (Pet. App. 1a-31a). The Court of Appeals rejected Petitioners' principal claim on appeal, which was that the Orders Prohibiting Alienation had lapsed with the entry of the judgment in Goya's favor, holding that the orders were and remained effective against persons who, like Petitioners, had undisputed actual notice of the orders' existence and terms. (Pet. App. 9a-18a) The Court of Appeals further held that even though Petitioners were not parties to the underlying Puerto Rico Action, they were properly held in civil contempt because they aided and abetted defendant Liliane Unanue in violating the orders. In reaching this conclusion, the court followed settled caselaw in holding that Petitioners were not excused from civil contempt liability because they allegedly were under a mistaken view of the law or claimed to have had a good-faith belief that the Orders Prohibiting Alienation had expired. The court further found that the language of the orders was clear and unambiguous and that the issue Petitioners had raised concerning the orders' effectiveness did not constitute the type of ambiguity that could negate

contempt liability. (Pet. App. 18a-24a) Next, the Court of Appeals held that because the facts surrounding Petitioners' conduct were established by documentary evidence, an evidentiary hearing was not required. The court accordingly affirmed the contempt adjudication, as well as the District Court's order that Petitioners pay to Goya a sum equal to the purchase price for Apartment 10A as compensation for the loss Goya had suffered as a result of the contumacious sale. (Pet. App. 25a-27a) Petitioners now seek review on certiorari.

REASONS FOR DENYING THE WRIT

The District Court properly held Petitioners in civil contempt because they knowingly violated the Orders Prohibiting Alienation by engaging in precisely the transaction that those orders unambiguously prohibited. The Court of Appeals affirmed the contempt adjudication for substantially the same reasons expressed by the District Court, while providing additional analysis of Petitioners' primary argument. Both courts explicitly rejected Petitioners' contention that the Orders Prohibiting Alienation had expired before Petitioners violated them in 1998, finding that contention inconsistent both with the purpose and intent of Puerto Rico Rule of Civil Procedure 56 as well as with the Puerto Rico Supreme Court's caselaw applying that rule. In reaching their conclusion, both courts relied in large measure on the undisputed actual notice of the Orders Prohibiting Alienation that Goya had provided to Petitioners. Both courts also held that Petitioners' incorrect argument that the orders had lapsed was insufficient to render the orders "ambiguous" so as to preclude civil contempt liability, rejected their remaining defenses, and required Petitioners to compensate plaintiff Goya for the substantial out-of-pocket loss it suffered from Petitioners' violation of the orders.

The first question presented in the petition for certiorari asks this Court to review and set aside the contempt adjudication against Petitioners. However, the petition identifies no violation of any decision of this Court, no conflict of lower court decisions regarding the applicable principles of compensatory civil contempt, and no important federal question on which this Court's guidance is necessary. All that is involved here is the lower courts' application of broad and generally "well settled" (Pet. 14) contempt principles to "the idiosyncratic circumstances of this case." (Pet. App. 18a)

The petition's second question asks whether the District Court and Court of Appeals correctly interpreted the terms of Puerto Rico Rule of Civil Procedure 56.4. On its face, this issue arises exclusively under the local law of the Commonwealth of Puerto Rico and thus is inherently unworthy of review on certiorari. Petitioners' attempt to bootstrap their claim of error in construing Puerto Rico law into an *Erie* violation adds nothing. The petition should be denied.

A. The Contempt Determination Was Proper And Raises No Issue Warranting Review

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *accord, e.g., International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *see also* 18 U.S.C. § 401(3) (federal court may punish as contempt any "disobedience or resistance to its lawful writ, process, order, rule, decree or command"). Among the purposes of

contempt proceedings is to compensate the party that suffers loss through another's knowing violation of a court order. *Hutto v. Finney*, 437 U.S. 678, 691 (1978); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). That was the sole purpose of the civil contempt proceeding here. (*See* Pet. App. 25a, 63a)

This Court's contempt caselaw "leaves unaltered the longstanding authority of judges . . . to enter broad compensatory awards for all contempts through civil proceedings." *Bagwell*, 512 U.S. at 838.[2] In our case, the District Court and the Court of Appeals applied traditional contempt principles in holding Petitioners in contempt for knowingly violating the Orders Prohibiting Alienation. In seeking review of that decision, Petitioners do not claim that the contempt adjudication violated any decision of this Court. Nor do they contend that the courts of appeals have reached conflicting decisions on an important legal issue or that the lower courts are in disarray and require this Court's guidance on the standards for civil contempt. To the contrary, Petitioners seem to concede that any "split among the circuits" is "absent" from this case and they describe the applicable law as "well settled." (Pet. 13, 14) Indeed, the opinion that Petitioners quote for two full pages (Pet. 15-17)

2. Petitioners cite many cases in which this Court, in recent years, has exercised its supervisory power to regulate contempt proceedings. However, none of the numerous cases cited by Petitioners in which this Court reviewed and in some instances overturned contempt determinations (Pet. 12-14, 18) involved compensatory civil contempt proceedings awarding damages on behalf of a litigant for violation of a court order, the type of proceeding at issue here. Rather, all involved either *criminal* contempt or *coercive* civil contempt, the types of contempt proceeding that have been viewed as subject to the potential for misuse and as raising potential constitutional issues.

as a fair summary of the law in this area not only was rendered by the same Court of Appeals that decided this case, but was authored by the very same Circuit Judge. *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16-17 (1st Cir. 1991) (Selya, J.).

The narrow issue on which Petitioners seek review is, in the Court of Appeals' words, whether "cobbling together [an assertedly] plausible legal argument about the effectiveness of an order renders the order unclear or ambiguous for contempt purposes." (Pet. App. 23a) As far as the petition shows, that narrow question — whether one can avoid civil contempt liability merely by raising an *incorrect* legal claim as to the *duration* of a court order (as opposed to the *meaning* of the order) — has never previously been the subject of any reported decision of any court anywhere.[3] An issue that appears never to have previously been litigated at the appellate level, and whose resolution would therefore have an impact on few if any other litigants, is a poor candidate for certiorari.

Beyond that, the Court of Appeals' holding — that one who violates a court order may not avoid liability for civil contempt by claiming to have relied on an incorrect view of the law as to whether the order was valid or effective — is correct and consistent with this Court's teachings. The sale of Apartment 10A, in which Petitioners knowingly participated, violated the Orders Prohibiting Alienation,

3. Goya too is unaware of any appellate case addressing this issue. One recent district court case supports Goya's position: *Popular Bank of Fla. v. Banco Popular de P.R.*, 180 F.R.D. 461, 465-66 (S.D. Fla. 1998) (defendants held in civil contempt for violating preliminary injunction of which they had actual knowledge, despite their "good-faith belief that the injunction was without effect and therefore unenforceable" at the time they violated it because the literal terms of the applicable Federal Rule of Civil Procedure had not been complied with).

which the District Court and the Court of Appeals, applying Commonwealth of Puerto Rico law, each independently held *were* in effect in June 1998. Petitioners' contention, in essence, is that they allegedly acted under a mistake of law when they assumed that they were free to disregard the Orders Prohibiting Alienation. This Court has held that such a mistake of law, even if made in good faith (which this one was not), does not negate liability for compensatory civil contempt. "An act does not cease to be a violation of a law and of a decree merely because it may [allegedly] have been done innocently." *McComb v. Jacksonville Paper Co.*, 336 U.S. at 191.[4]

Petitioners' claim that the orders were somehow ambiguous so as to preclude contempt liability is without merit. To be sure, this Court has established that one may not be held in contempt for violating an order "too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476

4. For that matter, even one who justifiably believes that a court order is unlawful, invalid or even unconstitutional, must obey the order unless and until it is modified or set aside on appeal, rather than disregard it. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Similarly here, the District Court entered the Orders Prohibiting Alienation, which commanded the named defendants in the Puerto Rico Action and those acting in concert with defendants from engaging in any transfer of Apartment 10A, without requiring that the orders be recorded in a real property registry or that any asset be physically seized. (*See* Pet. 6) If Petitioners believed that the Orders Prohibiting Alienation were improvidently granted by the District Court because they did not require Goya to take these steps or that they contravened a procedural rule, Petitioners were still required to obey the orders unless and until they were duly challenged and set aside, rather than engage in precisely the transaction those orders prohibited. *Cf. Popular Bank of Fla. v. Banco Popular de P.R.*, 180 F.R.D. at 465-66, discussed *supra* at note 3.

(1974). Thus, a contempt citation may not be based on an order "that can only be described as unintelligible" or issued for "disobeying a command that defies comprehension." *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). That is not this case. Here, as the Court of Appeals held, "it is difficult to imagine how the November 1995 orders could have been worded in a clearer, more unambiguous way." (Pet. App. 23a)

The continued effectiveness of the orders in June 1998 was not genuinely "ambiguous" either. At that time, Petitioners undisputedly knew of those orders as well as the subsequent judgment on the merits in Goya's favor, which the District Court had entered but simultaneously stayed (in accordance with the practice in Puerto Rico's local courts) so as to preserve the status quo until defendants exhausted their appeals. (*See* Pet. App. 5a-6a, 14a & n.4, 17a n.6, 20a, 36a-38a, 50a) Wallack Management and 625 Park also knew that in March 1998 — five months *after* the judgment was entered — Liliane Unanue's attorney had advised Wallack in writing that "the restraint against alienation [of Apartment 10A] continues in effect." They also knew that Liliane had recently sought a modification of the orders to permit her to sell Apartment 10A, and that in response, Judge Fusté had ordered Liliane's counsel and Goya to discuss a potential resolution to the issues raised by the motion and "to report back to the court so that it m[ight] make a final decision" on whether it would modify the orders. (*See* Pet. App. 6a, 39a; *see supra* pp. 6-7) Judge Fusté's ruling on Liliane Unanue's motion to vacate or modify the Orders Prohibiting Alienation demonstrates that those orders remained in effect in 1998 — otherwise there would have been nothing to vacate or modify — and that the orders would continue to remain in effect unless and until the court vacated them (which never

occurred). Thus, the March 1998 court order recognizing the continued validity of the Orders Prohibiting Alienation, known to Petitioners, is hardly consistent with Petitioners' claim that the continued effectiveness of those orders was "ambiguous."

Thereafter, even though a second lawyer for Liliane Unanue advised Petitioners that the proposed sale of Apartment 10A could not lawfully proceed, Petitioners went ahead with the sale while working hand-in-glove with Charles and Liliane Unanue to keep the sale secret, evidencing that all the participants in the transaction recognized that they had something to hide. (*See* Pet. App. 56a-57a) Finally, Petitioners also were sufficiently concerned about the likelihood of contempt proceedings when Goya learned of the sale that they negotiated for Rennert to indemnify 625 Park and Wallack Management against liability on Goya's claim. As the District Court cogently observed, this extraordinary "indemnification letter constitutes compelling evidence that [Petitioners] were aware of the possible illegality of the sale and their intent to allocate that risk among themselves." (Pet. App. 56a)

As the First Circuit Court of Appeals held long before this case, one who violates "a reasonably straightforward reading of [an] order" and "patently frustrate[s] the clear intent of the order" is properly held in contempt. *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 61 F.3d 94, 99 (1st Cir. 1995). The rule regarding ambiguities in court orders and injunctions exists "to prevent unfair surprise" to persons lacking reasonable notice of what is required of them, rather than to encourage searches for loopholes in orders whose purpose is clear. *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995) (Posner, J.). Given all that

Petitioners knew in 1998, it hardly "defie[d] comprehension" that consistent with Puerto Rico law, the Orders Prohibiting Alienation, which were entered to safeguard the ultimate enforceability of a potential judgment in Goya's favor, remained effective after the court had entered precisely such a judgment while staying the judgment's enforcement pending appeal. And given their undisputed knowledge and actions, including execution of the indemnification agreement that expressly contemplated a claim to be brought against them by Goya, Petitioners are the very last litigants who could possibly claim that the contempt proceedings came as an "unfair surprise."

Moreover, as the District Court and the Court of Appeals both observed, if Petitioners had been genuinely uncertain whether the proposed sale of Apartment 10A would violate the Orders Prohibiting Alienation, they could and should have asked for clarification from the court that issued the orders. (Pet. App. 20a-21a, 60a) Petitioners assail the lower courts' sensible suggestion that one who is unsure about the scope of duties imposed by a court order can seek a clarification or modification, but this Court made precisely the same observation more than 50 years ago. *See McComb v. Jacksonville Paper Co.*, 336 U.S. at 192; *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945); *see also International Longshoremen's Ass'n*, 389 U.S. at 70-72 (reversing contempt citation because, *inter alia*, district court had refused several requests to clarify its unclear order). Contrary to Petitioners' view, the Court of Appeals' decision was hardly "unprecedented" (Pet. 12) in suggesting that a non-party (as well as a party) concerned about potential contempt liability for violating an order can avoid any possibility of liability by seeking clarification from the court that issued the order. It was not even the first federal decision to make that observation *this year. See Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Servs. of Va., L.L.C.*, 2002 WL 726666, at *3

(S.D.N.Y. Apr. 24, 2002) (non-party with actual notice of a court order that is in doubt concerning its obligations under that order "ha[s] a duty to so inquire of th[e] Court").[5] Additionally, because a non-party can be liable for violating a court order only when it aids and abets or acts in concert with a party in doing so, the non-party always has the option of asking the *party* with whom it is acting in concert to request the clarification or modification, just as defendants Charles and Liliane Unanue had already done several times in this very case. The reason that Petitioners chose not to do so in this case is crystal clear: they knew that Judge Fusté would quickly respond that the Orders Prohibiting Alienation were, of course, still in full force and effect.

Lastly, Petitioners' passing suggestion that the decision below expands the scope of contempt jurisdiction over non-parties is also incorrect. The criteria for subjecting non-parties to contempt liability for violating a court order are well-settled. (*See* Pet. App. 19a-21a) Applying those criteria, the Court of Appeals held that Petitioners' status as persons bound by the Orders Prohibiting Alienation was a "foregone conclusion[]" and "open and shut" because each of them aided and abetted a party to the action, Liliane Unanue, in her knowing violation of those orders. (Pet. App. 20a-21a) The petition cannot and does not challenge that finding.

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5. Petitioners' fleeting suggestion that such applications would give rise to "advisory opinions" in contravention of Article III (Pet. 3) is wholly without substance. *See, e.g., Hendrix v. Page*, 986 F.2d 195, 200 (7th Cir. 1993) (Posner, J.) (citing *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945)). Their suggestion that such applications overburden the judiciary (Pet. 20) is simply frivolous. The present case illustrates that the opposite is true: clearly, it would have been far less burdensome for the courts to deal with a straightforward request for clarification as to the status of the Orders Prohibiting Alienation in 1998, rather than the protracted contempt proceedings necessitated by Petitioners' disobedience of the orders.

Because the contempt adjudication against Petitioners was consistent with well-settled law, was eminently warranted, and raises no significant legal issue, certiorari should be denied.[6]

B. Petitioners' Second Question Arises Entirely Under Puerto Rico Local Law And Raises No Federal Issue

Petitioners also ask this Court to review the Court of Appeals' construction of Rule 56.4 of the Puerto Rico Rules of Civil Procedure. Specifically, the question presented is whether an order prohibiting alienation of an asset under P.R. R. Civ. P. 56.4 is enforceable against persons that undisputedly have *actual knowledge* of the order, even if it has not been possible or practicable to record the order in a public registry of real property or to physically seize the underlying asset. (*See* Pet. App. 18a n.7)

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6. While the lower courts did not need to reach the issue, nor need this Court reach it to deny certiorari, Petitioners are also liable for contempt on an additional ground, separate and apart from their violation of the Orders Prohibiting Alienation. As Petitioners were aware at all relevant times, the subject-matter of the action before the District Court concerned the true ownership of Apartment 10A and whether Goya had the right to execute its New Jersey state-court judgment against that asset. Under these circumstances, Petitioners' participation in the sale of Apartment 10A while the litigation and appeal were pending "tended to defeat any decree which the court might ultimately make in the cause," so that it constituted a "fraud of the rights of plaintiffs to prosecute the suit to its conclusion, and . . . a contempt of court which might be proceeded against civilly." *Lamb v. Cramer*, 285 U.S. 217, 219 (1932) (Stone, J.). *See also, e.g., Merrimack River Sav. Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *Savoie v. Merchants Bank*, 84 F.3d 52, 59 n.6 (2d Cir. 1996); *Griffin v. County School Board*, 363 F.2d 206, 210 (4th Cir. 1966) (en banc); *Amsellem v. HQZ West 56th St. Assocs.*, 1988 WL 142501 (S.D.N.Y. Dec. 30, 1988).

On its face, and as Petitioners recognize, this question arises exclusively under the local law of the Commonwealth of Puerto Rico, which is the equivalent of state law, and raises no federal issue, much less an important one. It has been well-settled for many years that this Court does not grant certiorari to review state-law questions, except perhaps under truly extraordinary circumstances. *See, e.g., Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); *Bishop v. Wood*, 426 U.S. 341, 345-46 & n.10 (1976); *see generally* Robert L. Stern, Eugene Gressman *et al.*, *Supreme Court Practice* 134-35, 242-43 (8th ed. 2002).

Aware of the Court's disinclination to review state-law issues like this one, Petitioners seek to dress their state-law claim in federal clothing, contending that because the Court of Appeals supposedly erred in construing the Puerto Rico law of provisional remedies, it necessarily violated the mandate of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Petitioners are among the hundreds of disappointed litigants each year who, after their construction of state or local law has been rejected by a District Court and a Court of Appeals, try to manufacture a federal issue at the certiorari stage by transforming an alleged state-law error into an *Erie* violation. If this technique were permitted to succeed, such claims could, and quickly would, be presented by the loser of virtually every federal case presenting a state-law issue. Therefore, this Court amended what is now its Rule 10 more than twenty years ago to eliminate alleged federal-court errors of state law as grounds for granting certiorari. *See* Stern & Gressman, *supra*, at 243.

In any event, the Court of Appeals' decision-making process in this case fully conformed with *Erie*. A federal court violates *Erie* when it applies federal law to an issue properly governed by state law (or commonwealth law). But in this case, the Court of Appeals, like the District Court before it, understood, consistent with *Erie*, that it must examine and apply Puerto Rico caselaw in addressing the Puerto Rico-law issue before it. It began by defining the precise issue to be decided, noting Petitioners' tacit concession that the Orders Prohibiting Alienation were effective prior to the District Court's entry of judgment in Goya's favor, so that the only question to be addressed was whether the orders remained effective, against persons having actual notice of the orders, after the entry of judgment. (Pet. App. 10a-11a) The court recited the *de novo* standard of review applicable to this question of law. (Pet. App. 11a) Next, the Court of Appeals discussed the Puerto Rico Supreme Court's explanation of the purpose and construction of P.R. R. Civ. P. 56 in the leading case of *F.D. Rich Co. v. Superior Court*, 99 D.P.R. 158, 99 P.R.R. 155 (1970), which the First Circuit had previously quoted from, analyzed, and applied in *H.M.G. Property Investors, Inc. v. Parque Industrial Rio Cañas, Inc.*, 847 F.2d 908, 913-14 (1st Cir. 1988) (Selya, J.). (Pet. App. 11a-12a) Petitioners' suggestion that the Court of Appeals relied only on its "personal view" of how Rule 56 should be construed (Pet. 27) is wholly unwarranted.

The Court of Appeals then analyzed in detail a series of Puerto Rico Supreme Court cases arising under Rule 56.4 and its predecessor statute. (Pet. App. 13a-17a) The panel concluded that two Puerto Rico cases cited by Goya (*Freeman* and *Suárez*) were more apposite than the Puerto Rico cases cited by Petitioners (*Stargus Properties* and *Cooperativa*

Central), which it found to be readily distinguishable. (*See* Pet. App. 12a-17a)[7] The court did not "discern any other

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7. The Court of Appeals' conclusion was plainly correct. The issue was whether the Orders Prohibiting Alienation issued under P.R. R. Civ. P. 56.4 were effective as against persons with actual notice of the orders, even though it was impracticable for Goya to take certain procedural steps that Petitioners urge should have been taken. (*See* Pet. App. 18a n.7) As the Court of Appeals correctly described (Pet. App. 13a-15a), the Puerto Rico Supreme Court decisions in both *Freeman v. Superior Court*, 92 D.P.R. 1, 92 P.R.R. 1 (1965), and *Suárez Martínez v. Superior Court*, 85 D.P.R. 544, 85 P.R.R. 522 (1962), upheld prohibitions to alienate as valid under Rule 56.4 although the parties did not take the very same steps, there being no dispute that the defendants in those cases had actual notice. By contrast, in *Stargus Properties v. Superior Court*, 101 D.P.R. 95, 101 P.R.R. 139 (1973), there had been so many procedural lapses in obtaining a court order that it appeared the defendants were not even *aware* of the order they had allegedly violated; unsurprisingly, a contempt adjudication reached under these circumstances was vacated. (Pet. App. 15a-16a; *see also* Pet. App. 57a-59a) Finally, *Cooperativa Central de P.R., Inc. v. Flores*, 68 D.P.R. 726, 68 P.R.R. 672 (1948), involved an attachment of personal property, not a prohibition to alienate. (Pet. App. 16a-17a) That is a crucial difference because, as the Puerto Rico Supreme Court recently reaffirmed, "an attachment is the retention of goods by judicial order [while] a prohibition to alienate is a court's order addressed to [a] party . . . prohibiting the alienation of personal property or real estate." *Corporation for Dev. of the West, Inc. v. Municipality of Mayagüez*, No. CC-99-801 (P.R. Dec. 15, 1999) (unpublished judgment entitled to persuasive but not binding weight) (citing Rafael Hernández Colón, *Derecho Procesal Civil [Law of Civil Procedure]* 126 (1981)) (our translation from Spanish); *see also Quirós-López v. Unanue-Casal*, 998 F.2d 28, 32-33 (1st Cir. 1993) (distinguishing methods of enforcing attachments and prohibitions to alienate under Puerto Rico law); P.R. R. Civ. P. 56.4, paragraph 2 (providing procedure for effecting attachment, but not prohibition to alienate, of personal (Cont'd)

colorable argument" supporting Petitioners' contention that the orders had expired. (Pet. App. 17a). Therefore, based on the purpose, application and construction of Rule 56 as discussed in the Puerto Rico Supreme Court's decisions, the Court of Appeals accepted Goya's rather than Petitioners' position, just as had the District Court. This is precisely how federal-court analysis of a state-law issue under *Erie* is supposed to be performed.

Nothing in the opinion below suggests that the distinguished First Circuit panel did anything other than ascertain and apply the governing Puerto Rico law, or that the panel sought to avoid its *Erie*-prescribed role. Petitioners' self-interested disagreement with the Court of Appeals' analysis can hardly justify their aspersions that the panel "refused to abide by and apply" the relevant Puerto Rico Supreme Court decisions (Pet. 3) or that the panel only "purported" to follow Puerto Rico law (Pet. 23). Thus, the petition does nothing to overcome the overwhelming presumption that certiorari will not be granted on a purely state-law claim.

(Cont'd)
property through a depository); P.R. R. Civ. P. 53.9 (providing that judgment of a Puerto Rico court is automatically stayed pending appeal, implying that provisional remedies intended to secure a judgment favorable to plaintiff should continue in effect while the appeal is decided and until the judgment is executed) (*see* Pet. App. 17a n.6).

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-246

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IN THE

Supreme Court of the United States

WALLACK MANAGEMENT CO., INC.;
625 PARK CORPORATION and IRA LEON RENNERT,

Petitioners,

v.

GOYA FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

The Rule 29.6 Statement for the corporate petitioners was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

Petitioners Ira Leon Rennert, Wallack Management Co., Inc. and 625 Park Corporation respectfully submit this Reply Brief in further support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. Pursuant to Rule 15(6) of the Court, this Reply Brief addresses only new points raised in the Brief in Opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

POINTS ON REPLY

This Petition concerns the consequences of finding a nonparty in contempt of an order, when the effectiveness of the order was admittedly in serious doubt because of the failure of respondent to comply with the mandatory statutory conditions precedent requiring perfection in order for the Order to be effective. Respondent attempts to recast the issue raised in the Petition by erroneously asserting that petitioners are collaterally attacking the validity of the District Court's actions in issuing the Orders Prohibiting Alienation. In advancing this misleading characterization of the issue that was before the First Circuit and now before this Court, respondent raises four new points to support its view of the Petition. As discussed below, none of those issues alters the fact that the First Circuit's affirmance of the District Court's contempt finding constitutes a serious erosion of the stringent limits on a federal court's power to hold a nonparty in contempt.

In its Brief in Opposition, respondent raises four new issues, each of which is erroneous: (i) petitioners' actions were contemptuous because they frustrated respondent's ability to collect on any judgment (*see* Brief in Opposition at 20 n.6); (ii) due to the "idiosyncratic circumstances of

this case," it was impracticable or impossible to comply with Rule 56.4 of the Puerto Rico Rules (*see* Brief in Opposition at 4-5); (iii) based on certain deposition testimony, it is clear that the attorney who withdrew as counsel for Liliane Unanue in connection with the sale understood that the Orders Prohibiting Alienation were in effect (*see* Brief in Opposition at 7-8, 16-17); and (iv) petitioners contracted with Liliane Unanue to make the transaction secret in order to avoid contempt proceedings (*see* Brief in Opposition at 1).

First, respondent alternatively asserts that, even if petitioners' conduct did not constitute contempt because the Orders Prohibiting Alienation had lapsed, petitioners could nevertheless be found in contempt because they frustrated the Judgment. *See* Brief in Opposition at 20 n.6. Respondent is wrong because, to the extent that this doctrine still is in force today, the case law makes clear that this doctrine does not apply to a nonparty. Indeed, the decisions cited by respondent demonstrates this very point. For example, *Lamb v. Cramer*, 285 U.S. 217 (1932), involved the attorney who had appeared on behalf of the party. The attorney was an officer of the court, and represented the party with respect to both the litigation and the subject matter of the litigation. *Id.* at 218-19. Thus, he was subject to the court's contempt power by virtue of his status as an attorney. Further, all the subsequent authorities have limited *Lamb* to a precedent regarding the courts' power only over parties and attorneys who appear before them. *E.g.*, *Securities & Exchange Commission v. Comcoa Ltd.*, 887 F. Supp. 1521, 1527-28 (S.D. Fla.), *aff'd sub nom.*, *Levine v. Comcoa Ltd.*, 70 F.3d 1191 (11th Cir. 1995), *cert. denied*, 519 U.S. 809 (1996); *see* John E. Theuman, *Annotation: Attorney's Conduct as Contempt of Court – Supreme Court Cases*, 138 L. Ed. 2d 1151, § 8(a) (1999); J. P. Ludington, *Annotation: Attorney's*

Conduct as Contempt of Court – Federal Cases, 14 L. Ed. 2d 934, § 16 (1965).

Moreover, in *Amsellem v. HQZ West 56th Street Associates*, Nos. 86 Civ. 4451, 87 Civ. 1218, 1988 WL 142501 (S.D.N.Y. Dec. 30, 1988), the parties accused of contempt were the general partners of the partnership against which the judgment was directed and the alter ego and privy of the partnership against which the judgment had been rendered. *Id.* at *1. The conduct at issue was the partnership's sale of its property and the transfer of proceeds to its general partners, thereby rendering the partnership judgment proof. *Id.* at *2.[1]

Second, conceding that Rule 56.4 of the Puerto Rico Rules requires the physical seizure of the Cooperative Shares in order for the Orders Prohibiting Alienation to be effective post-judgment, respondent erroneously asserts that it should be excused from doing so here due to impracticability and/or impossibility. *See* Opposition Brief at 4-5. As a preliminary matter, respondent never offered any evidence at any stage of this proceeding to support such a proposition. Moreover, there was nothing impracticable or impossible. All respondent had to do was ask the district court to issue such an order. The record, in fact, objectively belies respondent's assertion, as the district court affirmatively required Liliane Unanue to deposit the Emperor Equities stock in the Amended Judgment. Respondent offers no explanation, let alone record

1. The other three decisions cited by respondent suffer from the same infirmity. *See Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *Savoie v. Merchants Bank*, 84 F.3d 52, 59 n.6 (2d Cir. 1996); *Griffin v. County School Board*, 363 F.2d 206, 210 (4th Cir.) (en banc), *cert. denied*, 385 U.S. 960 (1966).

support, why the same could not have occurred with respect to the Cooperative Shares. Further, impracticality is not a defense, as the statutory conditions are mandatory and are not waivable. *See* Petition at 26-28. Thus, given Goya's failure even to attempt to comply with Rule 56.4, respondent's excuse does not eliminate the substantial uncertainty that the First Circuit acknowledged at the outset of its decision.

Third, throughout its Opposition Brief, respondent relies upon deposition testimony knowingly obtained without appellants' participation. *See* Opposition Brief at 8-9, 16-17. Goya contends that this testimony was admissible, as it is the equivalent of an affidavit, but that assertion is wrong. Rule 32(a) of the Federal Rule of Civil Procedure permits a deposition to be used against a party on a motion only if that party was represented at the deposition or had reasonable notice of it. The conditions set forth in Rule 32(a) are mandatory. *See* 8A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2142, at 159 (3d ed. 1998). Consequently, "a deposition taken before a given party was added to the action may not be used against that party." *Id.* at 161. Because respondents disputed the fact supposedly evidenced by the deposition, the deposition testimony could not be used against them absent the right of cross-examination.

Fourth, respondent asserts that petitioners contracted to make the transaction secret to avoid contempt proceedings. *See* Brief in Opposition at 1. This proposition is unsupported by the record and can be afforded no weight. Further, it is absurd to assume, as respondent argues, that petitioners' indemnification agreement constitutes incontrovertible evidence that petitioners knew that their conduct was

prohibited. *See* Opposition Brief at 1. If this were true, petitioner Rennert would have knowingly agreed to pay double for the apartment. Indeed, if there was such a meaningful risk, consistent with the position that he expressed at the time, Mr. Rennert would have never purchased Apartment 10A. Finally, the so-called secrecy that accompanied the transaction has no bearing on the issue raised by this petition — the substantial uncertainty regarding the effectiveness of the Orders Prohibiting Alienation and the resulting bar to a finding of contempt against a nonparty.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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